

La Chaas:
The Métis Constitutional Right to
Hunt in the Canadian Legal Consciousness

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La Chaas:¹

The Métis Constitutional Right to Hunt in the Canadian Legal Consciousness



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**Bradley S. Bellemare
Masters of Law (LL.M.) Thesis
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¹ La Chaas is the Michif phrase for 'The Hunt.' Translation was provided by Norman Fleury a Métis elder from Brandon, Manitoba.

² "Métis Flag," online: Métis Commission <<http://www.metiscommission.com/history.htm>> (as of August 21, 2005).

The Métis Flag:

The flag was first used by Métis resistance fighters prior to the Battle of Seven Oaks in 1816. It is the oldest Canadian patriotic flag indigenous to Canada. The Union Jack and the Royal Standard of New France bearing the fleur-de-lis are older, but these flags were first flown in Europe. As a symbol of nationhood, the Métis flag predates Canada's Maple Leaf flag by about 150 years! The flag bears a horizontal figure eight, or infinity symbol. The infinity symbol represents the coming together of two distinct and vibrant cultures, those of European and indigenous North America, to produce a distinctly new culture, the Métis. The flag symbolizes the creation of a new society with roots in both Aboriginal and European cultures and traditions. The sky blue background of the flag emphasizes the infinity symbol and suggests that the Métis people will exist forever.

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ABSTRACT

The purpose of this thesis is to discuss the constitutional right of the Métis to hunt in the Canadian legal consciousness in the four levels of court that heard the *Powley* case and comment on the judicial approach and observations. After a comparative analysis of the precedent setting *Powley* decision, a brief examination is undertaken of two recent cases regarding Métis rights in Canada: *Lavolette* and *Willison*. Ultimately, the purpose of this research has been to show the treatment of Métis and First Nations' Aboriginal rights have not been treated equally and to confront the challenges that this analysis raises.

Section 35 of the Canadian Constitution has not provided the protections to Aboriginal rights that one would expect. In order to make changes to the legal system I have identified some fundamental problems with Aboriginal law in Canada associated with the identification of the source of those rights. Further, I have made some suggestions on the approaches that could be taken to change the direction of the Supreme Court of Canada regarding its interpretations of Métis rights.

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that what matters is the knowledge you receive;
not the grade.*

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have inspired me to never stop learning.*

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INTRODUCTION

As a Métis person, I see the pre-existing rights of Indigenous peoples being eroded in Canada. I see governments ignoring rulings from the Supreme Court of Canada about the rights that Aboriginal peoples have from our communities, our governments and within the Canadian constitution. Litigation is preferred to negotiation and we are forced into the courtroom to settle issues on a case-by-case basis.

Instead of the Federal or Provincial Governments being proactive in dealing with Métis rights we are often forced to compare ourselves to our First Nations relatives and the rights they have recognized under provincial hunting regulations. This is not a respectful way to assert our rights; neither is asserting that Métis rights are less than the Aboriginal rights of First Nations. It must be remembered that Chiefs often advocated for the fair treatment of the Métis regarding hunting and land rights in treaty negotiations from the Robinson-Huron negotiations up to the numbered treaties on the prairies. The treaty commissioners made ‘promises’ to the Chiefs that the Métis would be treated ‘fairly and justly.’¹ Those ‘promises’ have never been fulfilled.

I do not wish to detract or attack the rights of First Nations peoples in the name of Métis rights. Indeed, as Métis people we have inherent and Constitutional rights because we have First Nations ancestry which is connected to the laws of our distinct historic communities – not because we have European ancestry. That is not to say however, that our practices as Métis can not be influenced by our European ancestry. Our traditions existed before the assumption of sovereignty by the Canadian state and our legal arguments can stand alone without comparing ourselves to First Nations.

¹ See Alexander Morris, “The Treaties of Canada with the Indians of Manitoba the Northwest Territories, and Kee-wa-tin,” (Toronto: Willing & Williamson, 1880) at 16, 69, 83, 99, 186-87, 193 and 294-95,

Like our First Nations relatives, however, we are forced to break Canadian laws in order to establish our pre-existing rights. By stating the Indigenous peoples of Canada, First Nations, Métis and Inuit peoples have rights, it should be understood that this is the recognition of rights from our distinct societies, cultures and governments. The scope of our inherent rights is not necessarily the limited rights that are referred to when s. 35 of the *Constitution Act, 1982* is discussed.²

As Métis people we need to be respectful to the fact that we were welcomed onto First Nations' lands to share in their traditions when European immigrant communities would not. We were allowed to share in the relationships to the land that our First Nations relatives have. At the same time, we were able to develop a distinct culture that was a mixture of European and First Nations' ways of life. From this mixture of cultures the traditions that we practiced became integral to us as a people.

One of the goals that I see the Métis seeking is to continue to exercise our rights of the past without the interference of an alien authority that attempts to dictate about when we can hunt for food for our sustenance or ceremonies. At the same time however, we must be considerate to the First Nations' treaty rights that recognize the longer standing rights to hunt on the same land. We do not need to be in conflict with one another when it is the governments in Canada that pose the greatest obstacles to Métis, First Nations and Inuit peoples from exercising our rights.

I believe that Métis people want to exercise our rights from the past today because it keeps us connected to the land, the spirits and our Grandfathers that have come before us. The practice of hunting or fishing for food is not in pursuit of game or something that

² *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35(1).

is external to us like it is to sport hunters and anglers. The tradition of the hunt is part of what makes us who we are as peoples. It does not necessarily define us, but it allows us to keep that connection to our cultural order that existed in our historic communities and governments. To the Métis, the pursuit of our rights has never been a game; yet, governments and courts continue to act as though it is a game where the rules can be changed when it suits their needs.

It is my hope, that through this work, one will see the barriers and rhetoric that are constantly placed in our way when we try to be the peoples we are. At the same time however, there are ways that the Métis can use the Canadian legal system in ways that First Nations can not. We must ask ourselves if the Canadian legal system is the proper venue to determine whether our rights are ‘worthy’ of protection under Canadian law. We can see that the approach of the Canadian courts to First Nations’ rights is very similar to the approach the courts have taken towards Métis rights. We already know that we do not need the Canadian state to recognize our rights in order for us to exercise them. The Métis present the opportunity for the Canadian state and the judiciary to reconcile the rights of Aboriginal peoples with the laws of Canada and change the one sided dialogue that has so far missed the mark in finding reconciliation of Aboriginal rights. Métis rights are part of the living tree and literally represent the mixture of First Nations and European cultures and the Métis represent an opportunity for the Canadian legal consciousness to abide by its principles of constitutional law.

This thesis is composed of four chapters and a conclusion. Chapter 1 sets out a brief historical background of the Métis. It lays out the migration of the first mixed blood people from the eastern parts of Canada into the west. This chapter also discusses how

and why the Métis were considered an important part of the fur trade that led to the settlements in west and northwest parts of the prairies. Finally, a discussion is presented about the settlements of Green Lake and Meadow Lake in Saskatchewan and the creation of the Northern Administrative District that made allowances for some Métis to hunt. Furthermore, a brief historical background is provided about the historic Okanagan Métis community in British Columbia.

Chapter 2 looks at the four levels of court which heard the arguments in *Powley*³. The interpretations of the courts in Ontario are examined as well as the Supreme Court decision that affirmed the Métis right to hunt in the Sault Ste. Marie area in Ontario. Specifically, this chapter examines the application of the *Van der Peet* test and the modification that was undertaken in order to apply it to Métis rights.⁴ The ten step test from *Van der Peet* is looked at from all levels of the court and the specific issues that were addressed in dealing with the constitutional challenge to the legality of the Ontario *Game and Fish Act* regarding Métis hunting rights.⁵

Chapter 3 looks at the *Willison*⁶ decision from British Columbia and the *Lavolette*⁷ decision from Saskatchewan. Both of these cases apply the principles set out by *Powley*. An analysis is provided on how the *Powley* approach was used in both cases. The issues of law are different as *Willison* deals with an assertion of a hunting right and *Lavolette* is based on the assertion of a fishing right.

³ See *R. v. Powley*, [2003] 2 S.C.R. 207, [2003] 4 C.N.L.R. 321.

⁴ See *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177, [1996] 2 S.C.R. 507.

⁵ See *Game and Fish Act*, R.S.O. 1990, c.G-1.

⁶ *R. v. Willison*, [2005] B.C.J. No. 924, 2005 BCPC 131.

⁷ *R. v. Lavolette*, [2005] S.J. No. 454, [2005] SKPC 70.

Chapter 4 is a theoretical discussion on how the Supreme Court has interpreted s. 35 of the Constitution. Since 1982 there have been differing approaches to interpreting treaty and Aboriginal rights in the Supreme Court. Ultimately, treaty and Aboriginal rights are being unilaterally modified. This approach has utterly failed to properly apply the Aboriginal perspective on the nature and source of the rights that are being changed by the Canadian legal system.

An analysis is also provided through legal theorists regarding the creation of law around s. 35 and the source of Aboriginal rights. It must be considered whether the Canadian legal system is the proper forum for settling disputes regarding the pre-existing rights of Aboriginal peoples. Further, it is suggested that the Métis present an opportunity for the judiciary in Canada to incorporate traditional laws of both European and Aboriginal cultures. Chapter 5 has some concluding observations about the problems of litigating Métis and other Aboriginal or treaty rights cases in the Canadian courts.

CHAPTER 1

GENERAL HISTORICAL BACKGROUND OF THE MÉTIS

1.0 Introduction: Ethnogenesis¹ of the Métis² People.

The ethnogenesis of the Métis dates back to the 1600s in the Great Lake regions of what is now Canada. The fur trade led to the creation of a new people – not First Nations and not European: the Métis. The first mixed blood people began to appear in the Great Lakes basin around places like Green Bay, Sault Ste. Marie, and Michalomacnac. Migration of the Métis westward occurred as a result of the expansion of the fur trade and the availability of work for mixed blooded people. Settlements began

¹ *R. v. Laviolette*, [2005] S.J. No. 454, 2005 SKPC 70 [*Laviolette* cited to S.J. No. 454]. Testimony of Dr. Frank Tough, Examination-In-Chief, Trial Transcripts, Vol. IV online: The Native Law Centre: <<http://www.usask.ca/nativelaw/factums/view.php?id=441>> at 1249 (as of November 8, 2005) [Tough]:

....[G]enesis means a birth. Ethnic, ethno means a group, a cultural group, an ethnic group. So it's the development of a new cultural group. So on one level in a very descriptive sort of way, we can talk about the Metis borrowing things, Indian and borrowing things European and that this is the birth of something. So it's essentially the birth of a new ethnic group.

² The word “MÉTIS” comes from the Latin *miscere*, meaning “to mix”; and was used originally to describe the children of Indian mothers and European fathers. Another term for the Métis is derived from the Ojibwa (Indians) word *wissakodewinmi*, which means “half-burnt woodsmen”, describing their lighter complexion in comparison to that of full-blood Indians. The French picked up the translation and often used the term Bois Brule, or “burnt-wood” for the Métis. They were also called by various other names including: Country-born, Black Scots, Métis anglaise, The Flower Bead Work People, The Buffalo People, Breeds and Half-breeds. One consistent characteristic that describes the Métis is implicit in the name the Cree gave them *o-tee-paym-soo-wuk*, which means “their own boss” or “people who own themselves” Online: Geocities <<http://www.geocities.com/SoHo/Atrium/4832/metis.html>> (as of May, 5 2005). See also “Histories of the Métis,” online: Geocities <<http://www.geocities.com/metisnation/metisdefined.html>> (as of May, 5 2005) where:

The Jesuit Father Vivier in 1750 first introduced the derogatory term half breed. He believed the very existence of being Métis was against the Laws of God. The English first called the Métis ‘those Peddlers’ (about 1750) and later called them ‘those Canadians’. The French were called ‘those French Canadians’. The English would later also adopt the French term Half Breed.... The Jesuit also called the Métis, *Couriers des Bois* meaning illegal runners of the forests but more commonly used the terms savage, heathen or half-breed. The A.F. Ewing Commission of 1935 decided to be Métis, ‘a person had to either look like an Indian or be able to establish Indian ancestry. They also had to live the life of an ordinary Indian and non-treaty Indians would be included’ as Métis. Malcolm Norris a member of the Commission maintained that, ‘if a person has a drop of Indian blood in his veins and has not assimilated in the social fabric of our civilization he is a Métis.’ This assimilation assumption is a European belief that is based on paternalistic logic.

appearing in Red River, northwest into Saskatchewan, Alberta and the eastern parts of British Columbia.

Elaborate trade routes were established by the Métis in conducting business for the Hudson's Bay Company and the Northwest Company until 1821. These trade routes led to strong inter-community relationships. The Métis were a versatile people that were employed for their wide variety of skills, such as their linguistic abilities, relationships with First Nations peoples, physical strength, and knowledge of the areas that were being traveled.³ The communities in the north and west in the prairies were usually very isolated. The Carlton Trail, which stretched from Manitoba to Alberta, provided a continual link between Métis communities.⁴

Métis see themselves as distinct from both First Nations and Europeans. This sense of distinctness lent itself to a sense of nationhood. It is suggested that the feeling of Métis nationalism was first seen in 1816 during Cuthbert Grant's conflict with the Governor of Assiniboia at Red River.⁵ The interconnected travel required in supplying

³ For a more detailed discussion of the contributions of the Métis to the success of the Carlton Trail see Tough, *supra* note 1 at 1216-1234.

⁴ See Tough, *ibid.* at 1244-1245:

Q Thank you. Now, this Métis people or Métis nation, I think you've said that the Métis people didn't look back and see themselves as Indians and they didn't look back to the European ancestors to see themselves as that. Is that a fair -- or am I putting words in your mouth?

A No. That's -- at a certain point in time that's fair. That's when we talk about the ethnogenesis. Yes, that happens.

Q Okay. I guess I need some -- I know it's really hard from dates on this, if you can, beginnings. You're talking about ethnogenesis. I gather that's a process.

A Yes.

⁵ See Tough, *ibid.* at 1244:

A Well, you get nationalism in the Métis going back to Cuthbert Grant's conflict with the Governor of Assiniboia at Red River in 1816. You have that sense of nationalism there, and very important in the fall of 1869 Louis Riel talks about the Métis nation, the new nation.

Q So -- and they used that word Métis nation in the 1816 and in 1869?

A I believe so.

Q Yes. And so geographically is it your understanding, you said you agree with the sentence so the Métis nation here in this sentence, what you're generally referring to as the Métis people, are they synonymous?

A Yes.

pemmican to the workers on the Carlton Trail, trading posts, the collection and distribution of furs and the constant mobility of Métis workers provided a sense of community to the Métis. It is a national identity that is based on the interconnectedness of the individuals in Métis society that traveled between remote locations in harsh and brutal climates.⁶

Today the Métis also have a distinct sense of National identity. One modern definition of who is a Métis was provided by the Métis National Council on September, 2002 at the MNC Annual General Assembly. “Métis means a person who self-identifies as Métis, is distinct from other Aboriginal peoples, is of historic Métis Nation Ancestry, and is accepted by the Métis Nation.”⁷ Métis identity can be seen in two very different geographical areas of Canada. Although, Métis communities are located all over Canada, the rights that exist within these communities deserve equal protection. The following section gives a brief historical background of the Métis in Green Lake and Meadow Lake in Saskatchewan and the Northern Okanagan in British Columbia.

⁶ See *ibid.* at 1274-1275 where Dr. Tough elaborates on mobility being a characteristic of the Métis:

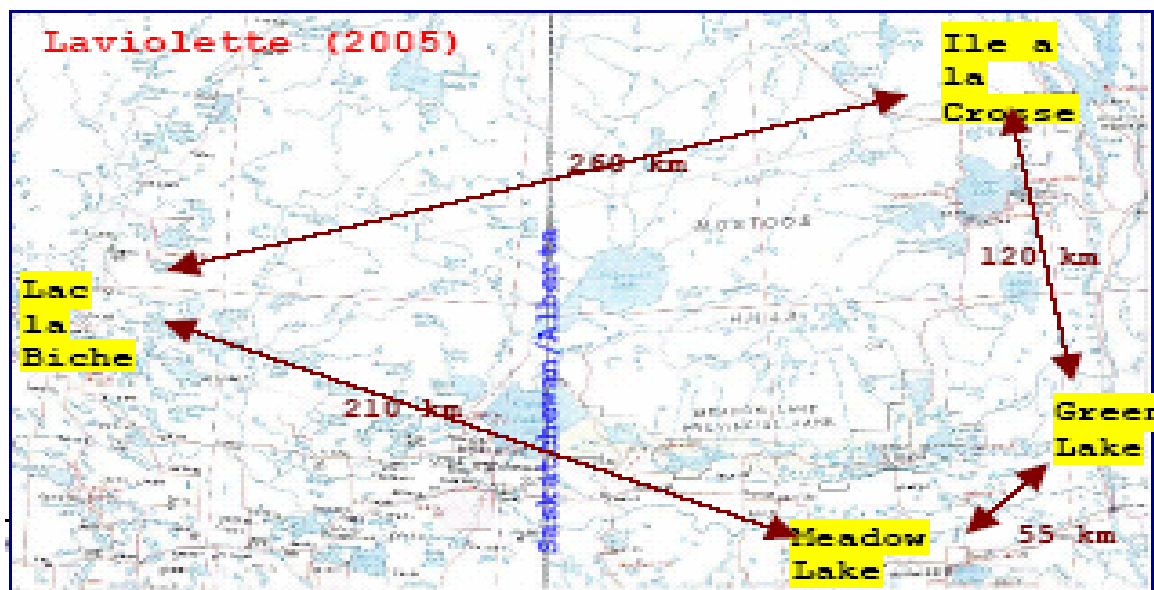
Q Do you have any sense whether mobility is a characteristic of the Métis people? Would you say that or is that not fair?

A Well, I think it's a characteristic because as I laid out in the fur trade, it involves an inter-regional movement of material, whether it's pemmican or furs or whatever, and the Métis are core to that, but also in this period that we might be looking at, you know, anywhere from 1821 to 1900, 1906, it's a period of change and it's a period of economic change and, of course, people have to respond to that, and one way to respond to those sorts of changes is to seek out new opportunities in different places. So I would think that -- I mean, the other key factor, if we want to compare this to the Indians after the treaties, the Indian population is, in essence, bottled up on reserves. It has a membership on that reserve. There are things like passed laws that prevent them from leaving the reserves. They restrict their movements. So in the treaty period, I would say it's quite possible one could argue that the Métis population is more mobile either in terms of life longitudinal movements or seasonal movements than Indian population.

⁷Jean Teillet, “Who are the Métis?” online: Métis Provincial Council of British Columbia <http://www.mpcbc.ca/files/who_are_the_metis.doc> (as of August 8, 2005).

1.1 General History of the Métis in Green Lake, Saskatchewan.

The origins of Green Lake date to approximately 1770⁸ with the first post being established by the North West Company in 1786.⁹ The first European settlements would have been the trading post that First Nations controlled along with inland transport of the goods being traded. The first appearance of mixed blooded people would have occurred around the 1780s in Northern Saskatchewan.¹⁰ At that period in time the town was in a region then known as Rupert's Land.¹¹ This territory more specifically breaks down into what is now known as northern Alberta and northern Saskatchewan. These areas were of particular interest to the Hudson's Bay Company and to the North West Company in conducting operations in the fur trade.



This map shows an historic Métis region in northern Saskatchewan and Alberta. This map is from Jean Teillet, *Métis Law Summary*, (Vancouver: Pape Salter Teillet, 2005) at 15.

⁸ Testimony of John Thornton, Examination-In-Chief, Trial Transcripts, Vol. V, online: The Native Law Centre <<http://www.usask.ca/nativelaw/factums/view.php?id=441>> at 964-965 (as of August 11, 2005) [Thornton].

⁹ See *ibid.* at 1136.

¹⁰ See *ibid.* at 1118.

¹¹ *Ibid.* at 965:

The charter given to the Hudson's Bay Company in 1670 defines Rupert's Land as all of those lands that are drained by rivers that flow into Hudson Bay. Now, at the time of the charter, really no European had a good sense of what that meant or how big the territory was anyway, but it is that territory that becomes Rupert's Land.

Green Lake acted as a base for Métis and First Nations fur traders and transporters. The initial trading posts, like Green Lake, became year round ‘fixed settlements’ after the merger of the Northwest Trading Company and the Hudson’s Bay Company in 1821.¹² Green Lake, however, had become a permanent post in 1786 with the names of Aubichon and Laliberte being listed as the men that helped set up the post at Green Lake.¹³

The importance of Green Lake was its strategic location in the north. It is located near the Beaver River which runs north to Ile-a-la-Crosse. Beaver River then flows into the Athabasca River in the south. It forms a type of triangle that allows for access to what was called the “richest beaver lands in North American.”¹⁴ These northern trading posts were of vital importance to the Northwest Company and the Hudson’s Bay Company before the merger of the two companies. The competitions for these areas were marred with violence against the First Nations traders that were employed by the Hudson’s Bay Company.¹⁵

The first mention of half-breed people in the Green Lake area was found in an arctic passage report in 1816.¹⁶ Around this period it was estimated that 18-20 families

¹² See *ibid.* at 970.

¹³ See *ibid.* at 985-986.

¹⁴ See *ibid.* at 980.

¹⁵ *Ibid.* at 991 where it is stated:

That perhaps doesn't seem too serious, but when you look at what happens in Green Lake, it takes on a more ominous tone, and there the bully is Peter Skeen Ogdon (ph) who, in fact, in order to discourage First Nations people in the area from trading from the Hudson’s Bay Company -- he doesn’t try and terrorize the Hudson’s Bay Company employees. He tries to terrorize the First Nations who are trading with the Hudson’s Bay Company. So he finds a First Nations person who is identified as a Hudson’s Bay Company trader and he basically murders him. He holds him under water and there’s a couple of different descriptions of his actions, but he ends up shooting and killing the fellow as an example to others that they better carry on business with the North West Company and not with the Hudson’s Bay Company.

Q And that actually happened at Green Lake.

A That’s in -- yes.

¹⁶ See *ibid.* at 993:

Q So Franklin does describe it as a half-breed population?

resided around Green Lake.¹⁷ After the merger of the two trading companies in 1821 many families were offered land allotments in Red River. The Hudson's Bay Company had more posts and people than it needed to conduct operations in Green Lake. Some families stayed behind and continued on with their lives in the community. The migration from Green Lake to Red River established a trade connection between families and friends that would travel from Red River to Green Lake and *vice versa*. The trade connections not only created a strong tie between the two communities, but Red River acted as the centre of Métis trade and a means of becoming aware of other Métis communities that had ties to the Red River area.¹⁸ John Thornton called this the start of Métis nationalism¹⁹ as well it was the start of the Métis economy.

With the establishment of the trade routes between Red River, Green Lake and other Métis communities, Métis economy begins to shape innovative institutions, which establish order in the conduct of trade between their settlements. As Thornton points out: that "[s]o we've got -- there are people who say that in order for people to become a nation, they need class institutions. I'm not going there. I'm just saying that the institutions themselves are the essence of nationhood."²⁰ In opposition to the government surveys leading up to the 1870 rebellion the sense of nationhood and belief in inherent

A Yes. He uses the phrase – let's see. It's over on page 16, I believe, "is much amused by the novelty of the salute given at our departure, the guns being principally fired by the half-breed women in the absence of the men."

Q And this is 1820 that we're talking about.

A Yes.

¹⁷ See *ibid.* at 997.

¹⁸ See *ibid.* 1005-1009.

¹⁹ See *ibid.* at 1010.

²⁰ *Ibid.* at 1015.

rights to their land and trading jurisdictions drew directly on those institutions that the Métis had created.²¹

In this economy Métis rights evolve. The economic connections between communities led to Gabriel Dumont declaring in Red River that he could bring 500 men from the prairies to help defend their river lots from being chopped up and given away by the Canadian government.²² This is evident in the posturing taken by Métis representatives sent to Ottawa, which included Louis Riel: “I think the Métis feel that they have a right to have a say in the affairs of all of Rupert’s Land, not just in Red River and, in fact, the negotiators go to Ottawa with specific instructions to protect the integrity of the Métis nation throughout Rupert’s Land, not just in Red River.”²³

With the Métis rebellion in 1885 around Batoche and Duck Lake the Green Lake Métis did not feel threatened by the Dominion government’s actions:

They didn’t feel the threat of Canada because Canada really wasn’t a significant player in their lives. Some of them did feel threatened by the fact that there was troubles going on to the south. Some of it would have been fear of First Nations. I mean, because Métis people have aboriginal ancestry, that doesn’t mean that they always have good relations with First Nations people. I mean they are separate peoples.²⁴

It was suggested by Mr. Thornton that the threat posed by the Canadian government was over land and not over the economic viability of Green Lake.²⁵

With the evolution of the transportation systems in Northern Saskatchewan (i.e. creation of ferry crossings and better road systems) the historical job opportunities for the Métis as transporters shifted from direct economic participation into one of more self-

²¹ *Ibid.*

²² See *ibid.* at 1017.

²³ *Ibid.* at 1018. The area of Rupert’s Land also included the community of Green Lake. Also see *ibid.* at 1159 where it is stated in cross-examination by Mr. Thornton that there is no record of anyone from Green Lake actually participating in the 1885 defense of Batoche by the Métis.

²⁴ *Ibid.* at 1032.

²⁵ *Ibid.*

sustenance. The reliance on hunting, fishing and trapping began to play a larger role in the lives of the Métis for sustenance and as Mr. Thornton suggests they began to resemble their Cree relatives in the area.²⁶

The hunt became more important to maintaining sustenance for individual families. Families lived quite far apart and the hunters would frequently go out on their own or in small groups through thick forest. The hunt would involve any animal that was available: moose, deer, bear or rabbits. Trapping was done in what was called open trap areas for fur bearing animals such as wolves, fox, coyotes and muskrats. Some of which were eaten like muskrats, beavers, squirrels and weasels. Fishing was done for any species that was available and was smoked for storage. All the meat from the hunt were either kept for food or sold commercially. These practices all occurred prior to and after the establishment of the province of Saskatchewan in 1905. The hunt was not limited to Green Lake or Meadow Lake proper; rather, the hunt took place over a very wide area in the northern part of Saskatchewan and Alberta.

In 1909 the first Canadian land surveyor, St. Cyr, made his way into the Green Lake area. St. Cyr acknowledged that there was a settlement of Métis people in Green Lake where buildings were being constructed and people resided there on a year round basis.²⁷ After the survey was completed there were 22 requests put into the Canadian government for settlement claims.²⁸ Of those 22 claims, 20 were from Métis people.²⁹

²⁶ See *ibid.* at 1034. See also *ibid.* In the land claims that were made by the heads of households of Green Lake of the 41 vocations listed one-third were involved in trading and trapping. One-quarter of the occupations listed were fishing. Ranching, farming and hunting showed up ten percent of the time. It is suggested by Mr. Thornton that these were activities that went beyond mere sustenance living and were actual commercial activities carried out by the Métis people in Green Lake.

²⁷ See *ibid.* at 1045.

²⁸ See *ibid.* at 1064 where Mr. Thornton makes an important observation about jurisdictional control of land until 1930: "It's important to make clear that the lands in Manitoba, Saskatchewan and Alberta remained under the jurisdiction of the federal government until the Natural Resources Transfer Act in 1930."

There were not scrip claims at that time because scrip could not be issued or claimed on un-surveyed land. The birthplaces of the individuals that were claiming land from the government varied from Green Lake, Red River, Ile-a-la-Crosse, Lake Athabasca, and Lac La Biche. The evidence given by Mr. Thornton suggests that the Green Lake settlement was mostly comprised of Métis people.³⁰

There was a traditional land title system prior to the government land scheme implemented by the Canadian government. “The essential idea here is that the claim to land prior to a formal land title system is based on the recognition of your neighbour’s occupation of a given site.”³¹ The Dominion government (i.e. the Department of the Interior) implemented a policy of \$3 per acre for settlement claims and all but two of the Métis claimants to land ceased.³² The Dominion Government also had recognized that there was a need to extinguish the Indian title of the ‘Half-breeds’ under the *Dominion Lands Act, 1879*.³³ The two Métis claims that survived were from members that had lived on the claimed land prior to the signing of Treaty 6 in 1876.

In 1939, the Saskatchewan government wanted to relocate immigrant settlers from the southwest corner of the province to the north. In consideration of protecting Métis land the government implemented a Métis type reservation which included the areas of Ile-a-la-Crosse, La Loche, Lac La Biche, Beaver River, Sled Lake and Dore

²⁹ See *ibid.* at 1050.

³⁰ See *ibid.* at 1053-1054.

³¹ *Ibid.* at 1060. See also at 1060 where Mr. Thornton states: “[t]he majority of the lands in Red River were, in fact, allocated and held by the Métis based on the recognition of their claim by their neighbors,....” See also *ibid.* at 1061 where Thornton states: “[p]eople allotted what they needed. They owned what they used.”

³² See *ibid.* at 1074.

³³ See *Dominion Lands Act, 1883*, (47 Vict.) c. 17 at s. 81(e):

To satisfy any claims existing in connection with the extinguishment of the Indian title, preferred by half-breeds resident in the North West Territories outside of the limits of Manitoba, on the fifteenth day of July, one thousand eight hundred and seventy, by granting land to such persons, to such extent and on such terms and conditions as may be deemed expedient.

Lake, Green Lake/Carlton Trail, Lavallee Lake and Cowan Lake. The influx of people from the resettlement project from the south and the relocation of the Métis settlement from Lestock to Green Lake, however, put tremendous strain on the local resources for the Métis people to survive on. Gettion Matt, who was the director of what started out as the Northern Settlers Rehabilitation Branch of the Department of Municipal Affairs for the Saskatchewan government, decided that:

[i]n terms of a social engineering project where he was going to convert the Métis from a hunting, fishing, trapping economy, with some ranching and agriculture going on, into commercial agriculturists on the model of the south. As part of that process, Métis from road allowances in southern Saskatchewan were to be moved north to Green Lake and the instance that I'm most familiar with is people -- of people coming -- being induced to move north from the Lestock area.³⁴

Ultimately, very few of the relocated Métis people stayed in the area of Green Lake and migrated elsewhere.³⁵

In the 1960s the Saskatchewan government created the Northern Administrative District (NAD). In this district the community of Green Lake was included, but the town of Meadow Lake was not. During that time the NAD was managed by a separate administration apart from the rest of Saskatchewan. Today this district is managed under

³⁴ *Ibid.* at 1175. See also *ibid.* at 1175 where Mr. Thornton discusses the relocation of the Métis from Lestock. The relocation of the Métis from Lestock was done by bringing four or five people from Lestock up to Green Lake and returning home to convince their peers to move to the north. However, this move was not done with the full consent of everyone in that community:

Now, I've been told stories of people riding the train, looking back, seeing their shacks on the road allowances being burnt as they were being relocated to the proposed new settlement area. So the Métis resettlement program is a mirror image then of a much larger program that had been set up in response to the drought in the southwest.

³⁵ See *ibid.* at 1083 where Mr. Thornton comments on the relocation of the Lestock Métis:

Very few. In fact, when I go through the -- for instance, the material that I used in my autobiographical sketches, the We Remember document from the Home Care Board, I can find all of the people in there trace their ancestry to families that were here before the settlement scheme. I could find no evidence of a family that had stayed in Green Lake having moved here from Lestock. Now, that isn't a complete survey. There may be exceptions to that.

one administration: Saskatchewan Environment Resources Management (SERM). “The NAD line runs approximately 12 miles south of Green Lake.”³⁶

Following the decision in *R. v. Morin & Daigneault*³⁷ SERM revised its application of fishing regulations for Métis people that live in the NAD. The Court of Queen’s Bench in Saskatchewan held that Métis have an existing Aboriginal right to fish for food.

[T]he trial judge’s finding that an Aboriginal right to fish existed in the Métis persons of northwest Saskatchewan separate and apart from the issue of Aboriginal title is one he was entitled to make and should not be disturbed....

[T]he departmental policy ... places a higher priority on treaty Indian fishing than domestic licence food fishing for Métis persons. In any one situation, Métis persons could be denied the right to fish for food in the interests of conservation while treaty Indian persons might continue to fish. As noted above, there is no basis to distinguish between Indian and Métis Aboriginal groups with respect to the right to fish for food. This policy constitutes infringement.³⁸

The SERM policy that was implemented only allowed for some Métis people to fish. The criteria that a Métis harvester had to meet was set out in the following four requirements: “(1) self-identification as Métis, (2) permanent residency in the NAD, (3) a long-standing connection to the specific settlement they are harvesting within, and (4) that the individual must live a ‘traditional lifestyle.’”³⁹ This policy allowed for Conservation Officers in the SERM to determine whether an individual asserting a Métis right to harvest was protected by law.⁴⁰ Some Métis were allowed to hunt in closed seasons while others were not.

³⁶Defendant’s Memorandum of Law (*R. v. Laviolette*), “Legal Pleading,” (April 11, 2005) online: The Native Law Centre <<http://www.usask.ca/nativelaw/factums/view.php?id=440>> at 4 (as of August 21, 2005). See also paras. 4 -8 for further reference to the Northern Administrative District.

³⁷*R. v. Morin & Daigneault*, [1998] 1 C.N.L.R. 182 (QB), [1998] 2 W.W.R. 18 [*Morin & Daigneault* cited to C.N.L.R.].

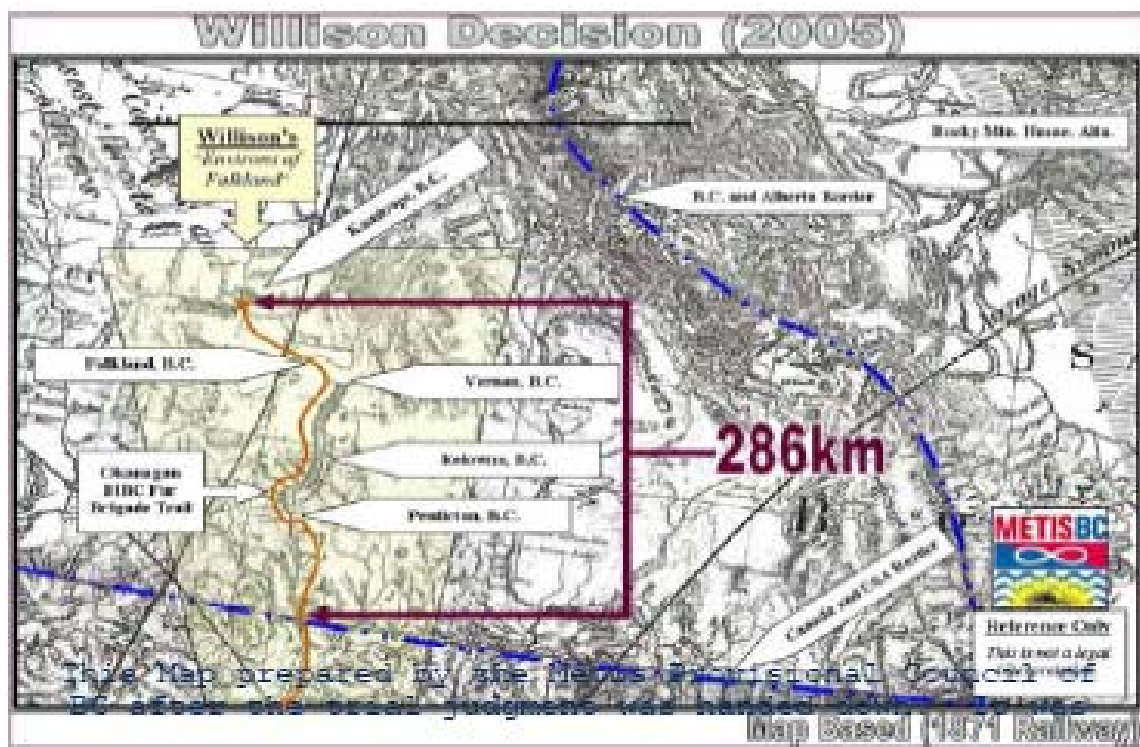
³⁸*Ibid.* at 19 and 22.

³⁹ Defendant’s Memorandum of Law, *supra* note 36 at para. 13. See also Testimony of K. Dillabough, Examination-In-Chief, Trial Transcripts Vol. I at 14-15 online: The Native Law Centre <<http://www.usask.ca/nativelaw/factums/view.php?id=441>> (as of November 8, 2005) [Dillabough E.I.C.]; and Testimony of K. Dillabough, Cross-Examination, Trial Transcripts, Vol. I, online: The Native Law Centre <<http://www.usask.ca/nativelaw/factums/view.php?id=441>> at 29 and 36 (as of November 8, 2005).

⁴⁰ See Defendant’s Memorandum of Law, *supra* note 39 at para. 14.

1.2 General History of the Métis in the Northern Okanagan, British Columbia.

There has been an existing historic Métis community in Okanagan/Shuswap for approximately 200 years. The origins of the Métis community were centered on the Brigade Trail which was the main transportation route of supplies among Columbia River, Fort Okanagan, Fort Kamloops, Fort Alexander, New Caledonia District Fort, Vancouver and Fort Astoria.⁴¹



This map is from the Métis Provisional Council of BC and reproduced by Jean Teillet, *Métis Law Summary*, (Vancouver: Pape Salter Teillet, 2005) at 15.

In light of hostilities that existed around the Brigade Trail Archibald McDonald⁴² believed that intermarriages among the First Nations women and his employees would

⁴¹ See Testimony of Dr. Michael Angel, Examination-in-Chief, Trial Transcripts, June 16, 2004, online: Native Law Centre <<http://www.usask.ca/nativelaw/factums/view.php?id=459>> at 37 (as of January 18, 2006) [Angel]. See also *R. v. Willison*, [2005] B.C.J. No. 924, 2005 BCPC 131 at para. 51 where a summary of the Brigade Trail is provided [Willison cited to B.C.J.].

⁴² See "Fort Langley," online: The Children of Fort Langley: <<http://www.fortlangley.ca/Archibald.html>> (as of January 14, 2006):

Archibald McDonald (1790-1853), fur trader, was born at Leechkentium Glencoe Appin, Argyllshire, Scotland, on February 3, 1790, and came out to Red River in 1813, in charge of a

help alleviate some of those problems.⁴³ The first Métis people to arrive in the Pacific Northwest had generally worked in Rupert's Land already and were Ojibway Métis or Cree Métis. These Métis were referred to as being similar to the Métis in Red River.⁴⁴

The Brigade Trail was generally run by French, French-Métis or Iroquois Métis and they were generally employed as boatmen.⁴⁵ The Hudson's Bay Company did not promote Métis within the ranks of the company.⁴⁶ The Métis men, like their relatives in the territories on the plains, became guides and translators.⁴⁷ As Dr. Angel points out, a new group of Métis began to take shape in the Okanagan.

[i]t is a very fluke situation where some of the people who came out here were Metis already because of the fact their connections with Red River. Some of the people who came out here were French or Scots or whatever, married local women here and, in effect, began a new group of Métis.⁴⁸

party of Lord Selkirk's colonists. He was deputy governor of the Red River Settlement under Miles MacDonell. He wrote a "Narrative respecting the destruction of the Earl of Selkirk's settlement upon the Red River in 1815" and a "Reply to the letter recently addressed to the Earl of Selkirk by the Hon. and Rev. J. Strachan". After the Red River troubles, he entered the service of the H.B.C.; and shortly after the union of the H.B.C. and the N.W.C. in 1821, he was sent to the Columbia. In 1828 he accompanied Governor Simpson on a journey from York Factory to the Columbia; and his diary of this journey has been published under the title "Peace River". He was promoted to the rank of chief trader in 1828; and from 1828-33 he was in charge of Fort Langley. From 1834-44 he was in charge of Fort Colville; and in 1842 he was made a chief factor. When he retired from the Company's service; he settled at St. Andrew's, Lower Canada; and here he died on January 15, 1853. In 1823 he married a daughter of Chief Comcomly, of the Chinook tribe; and by her he had one son, Ranald McDonald, whose reminiscences have been edited by W.S. Lewis and N. Murakami, under the title "Ranald MacDonald" (Spokane, Washington, 1923).

⁴³ See Angel, *supra* note 41 at 4.

⁴⁴ See *ibid.* at 49.

⁴⁵ See *ibid.* at 35 and 49.

⁴⁶ See *ibid.* at 45.

⁴⁷ See *ibid.*

⁴⁸ *Ibid.* at 53. See also at 53 where Dr. Angel commented on the mixes of peoples that come to help form the Métis of the Okanagan area:

Some of the people here were Iroquois who were part -- were Metis -- a -- a part and parcel of a French and Iroquois background and they -- these groups also married local women here. You had a Kanaka or Hawaiian people who also marry into these groups. So all these groups start out as different strands of -- of Metis, but they all come together --

Q Okay.

A -- because they intermarry amongst themselves. And what I was saying is that if one looks at -- because a lot of these people don't have written -- sources written for them, if you can do some of your homework, you keep running into these people all the time, you can find, for instance, somebody that is a Frenchman who comes out here and marries a local Flathead woman, comes up to Kamloops and one of his children marries an Okanagan woman and, you know, what you're doing is forming a tapestry of quite a number of different ethnic groups all coming together

The testimony by Dr. Angel was accepted by Stansfield Prov. Ct. J. in the British Columbia Provincial Court as establishing an historic Métis community that existed prior to the assertion of sovereignty in the Falklands area of B.C.⁴⁹

The hunt for sustenance was a tradition that was historically carried out for more than 200 years by the Métis in the Thompson/Okanagan area, but the earliest that Métis started to trade in the B.C. area was estimated to be 1776-1777.⁵⁰ The Métis hunt that occurred was related to the Brigade Trail and the fur trade. This hunt required a nomadic lifestyle in order to get the animals that were needed for the trade. The hunt for sustenance was of pinnacle importance as stated by Mr. Willison in his testimony: “[W]hen you were a hunter for the community ... the life of the entire community depended upon you and that is why we came up with the laws of the buffalo hunt ... today ... many Métis people wish to carry on with the traditional hunting practices.”⁵¹ The hunt by the Métis in British Columbia followed a similar traditional format which was followed by the Métis of Red River on the prairies:

[T]here was no buffalo hunting organized here in Oregon territory – or in historic Oregon territory, but the assembly of the buffalo hunt made a hierarchy of a -- of a captain of the hunt who was elected by popular vote or acclamation by show of hands. Those captain or captains would be the -- chosen for their knowledge, their -- their skill, their knowledge. They're able to determine where the game -- the best hunt would be, where the best results would be achieved and how to move the structure of the hunt to that place swiftly and then quickly to take advantage of the hunt. There was organized hunts for the large animals -- deer, moose, elk. There was large parties that hunted. There was not -- it was a communal hunt. There was probably -- as in the buffalo assemblies only -- only a half a dozen men who would actually do the actual shooting. The infrastructure was the support getting there, the camp, the skinning, the processing of the animals, uh, all needed a

in what I'm still calling the Metis. Because they distinguish themselves and are distinguished from other -- from strictly Aboriginal groups or from strictly European groups.

⁴⁹ See *Willison*, *supra* note 41 at para. 65 where it was stated that “[t]he environs of the Brigade Trail commencing in Fort Kamloops, moving south through the Falkland area itself and then the Okanagan Valley, and continuing south to what is today the US border en route to Fort Okanagan.”

⁵⁰ Testimony of Ronald Nunn, Examination-in-Chief, Trial Transcripts, June 16, 2004, online: Native Law Centre <<http://www.usask.ca/nativelaw/factums/view.php?id=461>> at 113-115 (as of February 4, 2006).

⁵¹ Testimony of Gregory Willison, Examination-in-Chief, Trial Transcripts, November 9, 2004, online: Native Law Centre <<http://www.usask.ca/nativelaw/factums/view.php?id=462>> at 113-115 (as of February 4, 2006) at 20-26.

support system, so those who participated, not everyone shot and hunted, but they were all part of the hunt per se.⁵²

The hunt was tied to structure and the organization of the Métis people as a whole in the Okanagan area.⁵³ The organization of the hunt is still carried on today in British Columbia.

⁵² Testimony of Ronald Nunn, *supra* note 50 at 117.

⁵³ See *ibid* at 136 where Mr. Nunn stated:

We were an organized, disciplined people - you know, a captain of the hunt was listened to ... at the big buffalo hunts, getting out of line or your place [T]he buffalo had to be run in stages ... [t]he first punishment was a disgraceful punishment: they'd take your bridle away and cut it up; the second was your saddle; the third time you were tied over a Red River cart and whipped. I don't know how many sustenance hunters went through that, but that is how disciplined people we were, and as a disciplined people we hunted communally for our elders, for our people. When that animal hit the ground, it was never a personally owned entity. It was owned by the community....

CHAPTER 2

THE SUPREME COURT AND THE MÉTIS HUNT

2.0 Background to *R. v. Powley*.¹

In 1993 Steve and his son Roddy Powley, Métis hunters, shot and killed a bull moose on October 22, 1993 near Old Goulais Bay Road, which is north of Sault Ste. Marie, Ontario. Neither Steve nor Roddy had a valid Ontario Outdoor Card or hunting license. The Powleys were charged on approximately October 29, 1993 in Ontario under s. 46 of the *Game and Fish Act*² which states: “No person shall knowingly possess any game hunted in contravention of this Act or regulations.”³ They were also charged under s. 47(1) of the *Game and Fish Act* which states: “Except under the authority of a licence and during such times and on such terms and conditions and in such parts of Ontario as are prescribed in the regulations, no person shall hunt black bear, polar bear, caribou, deer, elk, or moose.”⁴ The moose was tagged with a written note stating Steve Powley’s Métis card number and that the meat was for the winter. Steve and Roddy Powley had informed officers that the moose was killed for winter food. This assertion began the leading case on Métis rights in Canada.

The Powleys relied on a constitutional rights defence to the provincial charges. The Powleys challenged the charges based on the argument that they were exercising an Aboriginal right as expressed in s. 35(1) of the *Constitution Act, 1982* to hunt for food.⁵ The Powleys believed they were hunting under constitutionally protected rights in s.

¹ *R. v. Powley*, [2003] 4 C.N.L.R. 321, [2003] 2 S.C.R. 207 [*Powley* S.C.C. cited to C.N.L.R.].

² *Game and Fish Act*, R.S.O. 1990, c.G-1.

³ *Ibid.*, s. 46.

⁴ *Ibid.*, s. 47(1).

⁵ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35. (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

35(1) which provides that “[t]he existing aboriginal and treaty rights of aboriginal peoples of Canada are hereby recognized and affirmed.”⁶ The Powleys further argued that they had treaty rights under the Robinson-Huron Treaty of 1850. Steve Powley possessed an Ontario Métis and Aboriginal Association [OMAA] card from which he contended he has Aboriginal rights that include hunting, fishing, trapping, wild rice harvesting and timber rights. On his application form for the OMAA he stated that the purpose for having the card was to preserve his Aboriginal heritage and to harvest as his ancestors had done. Specifically, the Powleys challenged the constitutionality of the *Game and Fish Act* and the application of the Ontario Ministry of Natural Resources’ *Interim Enforcement Policy* which provided an exemption for status-Indians from the enforcement of ss. 46 and 47(1) of the Act and not the Métis. The Powleys contended that these laws and policies of the Ontario Ministry did not recognize Métis hunting rights.

Further, the provincial legislation was inconsistent with s. 52 of the *Constitution Act, 1982* which provides that “[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.”⁷ It was also contended that the provincial policy recognizing status-Indians’ right to hunt and not Métis’ rights violated s. 15 of the *Charter of Rights Freedoms*. Section 15 states “[e]very individual is equal before and under the law and has a right to the equal protection and equal benefit of the

⁶ *Ibid.* s. 35(1).

⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 52(1).

law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”⁸

2.1 Issues of Law in *Powley*.

Section 35 asserts that Métis have Aboriginal or treaty rights and that included in this are potential rights, recognized rights, or affirmed rights. Additionally, they may have incidental rights. The issue of fact and law in *Powley* was the existence and nature of the rights.

2.1.1 The interpretive principles to be applied when dealing with s. 35 of the *Constitution Act, 1982*.

The Supreme Court of Canada has established guidelines to follow when dealing with cases under s. 35 of the *Constitution Act, 1982*. In *R. v. Sparrow* the Supreme Court explained the approach to be taken when dealing with Aboriginal rights.

The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself.

... The nature of s. 35(1) itself suggests that it is to be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.⁹

In employing “[a] purposive approach to s. 35(1) will ensure that that which is found to fall within the provision is related to the provision's intended focus: aboriginal people and their rights in relation to Canadian society as a whole.”¹⁰ Section 35 of the *Constitution Act, 1982* is in place to protect pre-existing rights of Aboriginal peoples.

⁸ *Ibid.* s. 15(1).

⁹ *R. v. Sparrow*, [1990] 3 C.N.L.R. 160 [S.C.C.], [1990] 1 S.C.R. 1075 at 160-61 [*Sparrow* cited to C.N.L.R.]. See where the purposive approach was first applied in Canadian law: *Hunter v. Southam* (1984), 11 D.L.R. (4th) 641, [1984] 2 S.C.R. 145.

¹⁰ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, [1996] 4 C.N.L.R. 177 at para. 21 [*Van der Peet* cited to S.C.R.]. See also: *R. v. Powley*, [1999] 1 C.N.L.R. 153, [1998] O.J. No. 5310 Ont. Ct. Jus. (Prov. Div.) [*Powley* Ont. Prov. Ct. cited to C.N.L.R.] at para. 20 where Vaillancourt Prov. Ct. J. summarized the approach to be taken when dealing with Aboriginal claims:

a) a court must give a generous and liberal interpretation when analyzing the purposes underlying s.35(1), all treaties, s.35 itself, and other statutory and constitutional provisions protecting the

Lamer C.J.C. alluded to the purposes of s. 35 to protect Aboriginal rights in *Van der Peet*.

[T]he Aboriginal rights recognized and affirmed by s.35(1) are best understood as, first, the means by which the Constitution recognizes, the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive Aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of Aboriginal rights must be directed at fulfilling both of these purposes;¹¹

The purposive approach was affirmed by the Supreme Court:

The overarching interpretive principle for our legal analysis is a purposive reading of s. 35. The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and the promise of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture.¹²

The acknowledgement of the purposive approach by the Supreme Court led to the application of the modified *Van der Peet* test to Métis claims, which became the *Powley* test.¹³ The rights of Aboriginal peoples are seen by the Supreme Court as collective rights. “Aboriginal rights are collective rights although each member of the group has a personal right to exercise them.”¹⁴ This is a unique combination, Métis have the rights as a collective; yet, each man, and woman and child has the personal right to exercise collective practices, traditions and customs within Aboriginal societies.¹⁵

interests of Aboriginal peoples; (b) the nature of the relationship between the Crown and Aboriginal peoples is fiduciary thereby placing the honour of the Crown at stake; (c) any doubt or ambiguity must be resolved in favour of the Aboriginal peoples; (d) courts must be sensitive to the Aboriginal perspective with respect to the rights at stake and (e) since 1982, rights cannot be extinguished but can only be regulated or infringed with the justificatory test as laid out by the Supreme Court in *Sparrow* and subsequent cases.

See also *Sparrow*, *supra* note 9 at 179 and 182; *Simon v. The Queen*, [1986] 1 C.N.L.R. 153, [1985] 2 S.C.R. 387 at 167 [*Simon* cited to C.N.L.R.]; *Nowegijick v. The Queen*, [1982] 2 C.N.L.R. 89, [1983] 1 S.C.R. 29 at 94 [*Nowegijick* cited to C.N.L.R.]; and *R. v. Sutherland*, [1980] 3 C.N.L.R. 71, [1980] 2 S.C.R. 451 at 80 [*Sutherland* cited to C.N.L.R.].

¹¹ *Van der Peet*, *ibid.* at para. 43.

¹² *Powley Ont. Prov. Ct.*, *supra* note 10 at para. 13.

¹³ *Ibid.* at para. 14.

¹⁴ *Ibid.* at para. 22 per Vaillancourt Prov. Ct. J. See s. 35(4) of the *Constitution Act, 1982*, *supra* note 5.

¹⁵ See *Constitution Act, 1982* *supra* note 5 at s. 35(4) where: “Aboriginal and treaty rights are guaranteed equally to both sexes.” *Egan*, Patricia Monture “The Right of Inclusion,” in Kerry Wilkins ed. *Advancing Aboriginal Claims* (Edmonton: University of Alberta, 2004) at 51 where she states: “The experience and

The Ontario Provincial Court in *Powley* recognized the Métis as peoples that have their traditional practices protected under s. 35 of the *Constitution Act, 1982*.¹⁶ On appeal to the Ontario Superior Court of Justice the issue of Ontario's failure to recognize Métis hunting rights in provincial hunting regulations was addressed. In reviewing an appeal a higher court will not interfere with factual findings of a lower court "[u]nless it can be established that the Trial Judge made some palpable and overriding error which affected his assessment of the facts."¹⁷ The application of this principle applies to cases regarding Aboriginal rights as well.¹⁸ The Crown appealed the findings of the lower court regarding the purposive analysis regarding the Métis in s. 35(1) of the *Constitution Act, 1982*.

The Superior Court addressed this issue when it referred to the purposive approach established by the Supreme Court in *Van der Peet*. "Until it is understood why aboriginal rights exist, and are constitutionally protected, no definition of those rights is

responsibilities of First Nations men (hunting and fishing, although these were not exclusively male roles) have gained legal prominence, while women's pursuits have remained invisible and unconsidered as legal rights." This assertion seems inconsistent with the fact that no court has held that the rights recognized and affirmed by s. 35 cases only apply to male Aboriginal litigants. Further, it is explicitly stated in s. 35(4) that the application of treaty or Aboriginal rights is done equally for men and women. What is more, *Van der Peet* was about a female member of the Sto:lo people selling fish – no issue about gender was represented in the decision of the Supreme Court.

¹⁶ See *Powley* Ont. Prov. Ct., *supra* note 10 at para. 23.

¹⁷ *Stein v. Kathy K (The)*, [1976] 2 S.C.R. 802, (1975) 62 D.L.R. (3d) 1 at 808 [*Kathy K* cited to S.C.R.].

¹⁸ See *Van der Peet* *supra* note 10, at para. 80 per Lamer C.J.C.: "[T]he findings of fact made by the Trial Judge should not, absent a palpable and overriding error, be overturned on appeal...." See also *R. v. Adams*, [1996] 4 C.N.L.R. 1 (S.C.C.), rev'g [1993] 3 C.N.L.R. 98 (Que. C.A.), which aff'd [1985] 4 C.N.L.R. 39 (Que. Sup. Ct.), which aff'd [1985] 4 C.N.L.R. 123 (Que. Ct. Sess. P.) at para. 38 [*Adams* cited to C.N.L.R.]. Also see *R. v. Côté*, [1996] 4 C.N.L.R. 26, [1996] 3 S.C.R. 139 at 50 [*Côté* cited to C.N.L.R.]:

[T]he role of this Court is to rely on the findings of fact made by the Trial Judge and to assess whether those findings of fact are both reasonable and support the claim that an activity is an aspect of a practice, custom or tradition integral to the distinctive culture of the aboriginal community or group in question.

possible.”¹⁹ The Crown argued that the purposive analysis of s. 35(1), which included the Métis in this provision, was for two purposes:

To provide, first, the means by which the Constitution recognizes that within a relatively short time after the arrival of Europeans in North America distinctive local communities of persons of mixed aboriginal and European descent, having distinctive cultures, came into existence at certain localities that were centres of fur trade activity or strategically located in the fur trade between Indians and Europeans, and, second, to provide the means by which the existence of those local non-Indian aboriginal communities, prior to the establishment of effective control by the Crown over the localities, is reconciled with the assertion of Crown sovereignty over Canadian territory.²⁰

The Crown also contended in the appeal that the proper analysis of s. 35(1) should be amended with a change to the *Van der Peet* test.

[T]he Aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to [the assertion of effective control by the Crown in North America] the land was already occupied by distinctive Aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of Aboriginal rights must be directed at fulfilling both of these purposes.²¹

Justice O’Neil for the Ontario Superior Court, recognized that fundamental justice and fairness lie ‘at the heart’ of s. 35(1) and that includes protecting the collective identity and rights of Métis people.

[A]boriginal rights are a matter of fundamental justice protecting the survival of aboriginal people, as a people, on their lands. The Métis have aboriginal rights, as people, based on their prior use and occupation as a people. It is a matter of fairness and fundamental justice that the aboriginal rights of the Métis which flow from this prior use and occupation, be recognized and affirmed by s. 35(1) of the Constitution Act, 1982.²²

In consideration of the Trial Judge’s application of the *Van der Peet* principles for establishing the time frame of the right being asserted, O’Neil J. held: “In my view, the learned Trial Judge’s reasons reflect both a review of, and a consideration for, the

¹⁹ *Van der Peet*, *supra* note 10 at para. 3.

²⁰ *R. v. Powley*, [2000] 2 C.N.L.R. 233, [2000] O.J. No. 99 Ont. Sup. Ct. at para. 14 [*Powley* Ont. Sup. Ct. cited to C.N.L.R.].

²¹ *Ibid.* at para. 15.

²² *Ibid.* at para. 16.

purposes underlying the inclusion of Métis people in s. 35(1).”²³ Further, the time frame applied by the Trial Judge was not an error of law.²⁴

In the Ontario Court of Appeal the Crown contended that the Powleys had not “[m]ade out a relevant constitutionally protected Aboriginal right, and submit[ted] that the respondents’ claim cannot withstand scrutiny under a proper application of the principles developed for non-Métis Aboriginal rights.”²⁵ Sharpe J.A., for the Ontario Court of Appeal, agreed with the two lower courts that a purposive approach to Aboriginal rights is necessary when doing an analysis of a potential claim. The Crown and the Powleys stipulated that the application of *Van der Peet* test was appropriate for determining Métis rights. The Crown contended that “[w]hile the Métis community and its practices should be assessed as of 1850, only practices that were also practices of the Métis’ pre-contact Indian ancestors are capable of supporting a s. 35 right.”²⁶ The Powleys argued that, “Métis rights are not derivative of the practices of their pre-contact Indian ancestors, and that it is the practices of the Métis themselves that were integral to the Métis way of life before the time of effective European control that provides the source for Métis rights.”²⁷ 1850 was considered the date of effective control.

Although there may have been contact, Dr. Ray’s evidence would suggest that the Upper Great Lakes area was under almost exclusive tribal domination until at least 1815-1820. Sometime between 1815 and 1850, the area evolved into one where effective control passed from the Aboriginal peoples of the area (Ojibway and Metis) to European control.²⁸

Sharpe J.A. found that Métis rights must be considered independently of First Nations’ rights.

²³ *Ibid.* at para. 20

²⁴ *Ibid.* at para. 20.

²⁵ *R. v. Powley*, [2001] 2 C.N.L.R. 291, [2001] O.J. No. 607 (Ont. C.A.) at para. 76 [*Powley* Ont. C.A. cited to C.N.L.R.].

²⁶ *Ibid.* at para. 98.

²⁷ *Ibid.* at para. 99.

²⁸ *Powley* Ont. .Prov. Ct., *supra* note 10 at para. 90.

It seems to me that, in keeping with the interpretive principles to which I have already referred, we must fully respect the separate identity of the Métis peoples and generously interpret the recognition of their constitutional rights. The rights of one people should not be subsumed under the rights of another. To make Métis rights entirely derivative of and dependant upon the precise pre-contact activities of their Indian ancestors would, in my view, ignore the distinctive history and culture of the Métis and the explicit recognition of distinct 'Métis peoples' in s. 35.²⁹

He held that there was “[a] discernable conception of Aboriginal rights arising from the distinctive relationship the Aboriginal peoples have with the lands and waters of their traditional territories, and one would expect the nature of Métis rights to correspond in broad outline with those of Canada’s other Aboriginal peoples.”³⁰

2.1.2 The process for determining an exercise of an existing Métis right to hunt.

The Powleys are Métis for the purposes of s. 35(2) of the *Constitution Act, 1982*. At the core of the test for who is a Métis person in *Powley* is one who self-identifies as a Métis,³¹ has a genealogical connection to an historical Métis community, and can “[p]iece together the existence of a definable Métis existence from location to location.”³² Identifying who is Métis has considerable challenges as alluded to by the Ontario Provincial Court. “Innovative spellings of names, spotty record keeping, lost documents and the mobility of the Métis are but a few of the challenges that face either individuals or organizations in developing an accurate census of the Métis population.”³³

In Canadian law there is no definitive application of the term Métis.³⁴ The Ontario Provincial Court suggested that the Métis should decide who Métis are; until that

²⁹ *Ibid.* at para. 101. See also *Powley Ont. C.A.*, *supra* note 25 at para. 101 where Sharpe J.A. also refers to the *Royal Commission on Aboriginal Peoples* (Ottawa, Royal Commission on Aboriginal Peoples, 1996) [RCAP] vol. 4 at 220 regarding Métis culture:

[d]erived from the lifestyles of the Aboriginal and non-Aboriginal peoples from whom the modern Métis trace their beginnings, yet the culture they created was no cut-and-paste affair. The product of the Aboriginal-European synthesis was more than the sum of its elements; it was an entirely distinct culture.

³⁰ *Powley Ont. C.A.*, *supra* note 25 at para. 104.

³¹ *Powley Ont. Prov. Ct.*, *supra* note 10 at para. 32. The Métis have also been referred to as half-breed, chicot, and bois-brule.

³² *Ibid.* at para. 58.

³³ *Ibid.* at para 61.

³⁴ *Ibid.* at para. 31.

is done the Provincial Court embraced an objective approach to determine whether an individual is Métis for the purpose of an Aboriginal rights claim. In that sense, the courts did not need to define who the Métis people are; rather, the Provincial Court sought to work with the systems that are incorporated through various provincial organizations and not through an adversarial approach³⁵ to be determined by the Canadian legal consciousness.³⁶

The Trial Court determined the historical occupation of Sault Ste. Marie by the Métis. Further, the lack of a commonly accepted definition of who is a Métis person led the Provincial Court to conclude that “I find that a Métis is a person of Aboriginal ancestry; who self identifies as a Métis; and who is accepted by the Métis community as a Métis.”³⁷ This reflects the collective and personal rights involved. The Provincial Court also suggested that “[t]he definition game of who is a Métis can be continued on an issue to issue basis and site to site basis and an individual basis.”³⁸

On appeal to the Ontario Superior Court of Justice the Crown argued that the determination of the Trial Judge in defining who is a Métis person is deficient for the purpose of establishing an Aboriginal rights claim. The Crown argued that acceptance into the OMAA and the Métis Nation of Ontario [MNO] does not define an individual as a Métis person and “[t]hat objectively determinable cultural ties of the claimant to the

³⁵ *Ibid.* See also para. 41 where Judge Vaillancourt stated:

I am of the view that a court is not the ideal forum to deal with political matters. The definition question would best be addressed through negotiation and consensus building rather than an adversarial process.

For a further discussion on the differing approaches taken see *Re Lovelace et al. and The Queen in the Right of Ontario et al.* (indexed as *Ardoch Algonquin First Nation v. Ontario*) (1997), [1998] 2 C.N.L.R. 36, [1997] O.J. No. 2313 (C.A.) [*Lovelace* cited to C.N.L.R.] at 61. See also *RCAP supra* note 29 at 203. See also *Powley, supra* note 10 at para. 42 for the Métis Nation of Ontario 1997 By-Laws regarding the definition of a Métis person.

³⁶ See also *R. v. Blais*, [1997] 3 C.N.L.R. 109 (Man. Prov. Ct.), [1996] M.J. No. 391 [*Blais* cited to C.N.L.R.] at 114.

³⁷ *Powley* Ont. Prov. Ct. at para. 47.

³⁸ *Ibid.* at para. 133.

local”³⁹ must be added to the definition. A Crown witness, Ms. Gwynneth C.D. Jones, testified that the Powleys are Métis.

- A: ... Without looking at every one of those individuals, I can't say there were exactly this many families of this descent in this area. We know that the probability was that most of them were of mixed Aboriginal and non-Aboriginal ancestry.
Q: Were any of these families direct ancestors of Steven Powley?
A: Yes.⁴⁰

The historic evidence also supported the claim that the Powleys are Métis. In addition to holding a valid Métis card O’Neil J. agreed with the Trial Judge that “[o]n all of the evidence, that the respondents were Métis who had been accepted into ‘contemporary Métis society’, at the time that the offences were alleged to have taken place.”⁴¹

O’Neil J. of the Ontario Court of Justice however, altered the definition provided by the Trial Judge on two points. First, the explicit requirement that a blood quantum requirement threshold be met should not be accepted. He reasoned that a strict blood quantum requirement would possibly extinguish Métis rights through bloodlines.⁴² Secondly, O’Neil referred to *RCAP* and its references to the *Draft International Declaration on the Rights of Indigenous Peoples*.⁴³ At the heart of the citation of the aforementioned document is the right of self-determination and self-identification of Aboriginal peoples. This was relevant because the court accepted that it was up to the Métis to determine who the Métis are and not an outside agency or court.

³⁹ *Powley* Ont. Sup. Ct., *supra* note 20 at para 42.

⁴⁰ *Powley* Ont. Prov. Ct., *supra* note 10 at para. 67.

⁴¹ *Powley* Ont. Sup. Ct., *supra* note 20 at para. 54.

⁴² *Ibid.* at para. 56. See also para. 57.

⁴³ *Ibid.* see para 58. *Draft Declaration of Human Rights*, [1994] 1 C.N.L.R. 40.

The Ontario Superior Court emphasized its rejection of a blood quantum requirement because it would undermine the “fundamental purposes” of s. 35 rights.⁴⁴ The rights are seen as collective, but individuals are the ones that exercise those rights.

The Superior Court rejected the submission by the Crown that there must be: “[o]bjectively determinable ties of a claimant to a local Métis community” on two grounds.⁴⁵ O’Neil J. held that:

Firstly, it runs counter to the way the Supreme Court envisaged aboriginal rights to be interpreted and exercised. In *Sparrow* the Court stipulated that s. 35(1) is to be interpreted in a purposive way and that a generous liberal interpretation, resolving doubt in favour of aboriginal peoples, is demanded given the purpose of the provision to affirm aboriginal rights.⁴⁶

And second,

[i]t places an unrealistic burden on applicants claiming Métis rights that are not placed on applicants claiming other aboriginal rights. Aboriginal rights are collective rights although each member of the collectivity has a personal right to exercise them. They are rights held by a collective and are in keeping with the culture and existence of that group. The aboriginal rights claimant must be a member of that aboriginal community, but each individual within that community does not have to meet an individual cultural means test.⁴⁷

O’Neil J. also implemented a working definition for the court in making a determination about who is a Métis person:

- a) has some ancestral family connection (not necessarily genetic),
- b) identifies himself or herself as Métis and
- c) is accepted by the Métis community or a locally-organized community branch, chapter or council of a Métis association or organization with which that person wishes to be associated.⁴⁸

Sharpe, J.A. agreed with the approach of O’Neil J. of the Superior Court regarding the definition of who is a Métis person. This definition, however, is a “[t]est of who can

⁴⁴ *Powley Ont. Sup. Ct.*, *supra* note 20 at para. 61.

⁴⁵ *Ibid.* at para. 60.

⁴⁶ *Ibid.* at para. 60.

⁴⁷ *Ibid.* See also *Pasco v. C.N.R. Co.* (1989), 56 D.L.R. (4th) 404, 34 B.C.L.R. (2d) 344 (C.A.) at 410 [*Pasco* cited to D.L.R.]; *Twinn v. Canada*, [1987] 2 F.C. 450 (T.D.), [1986] F.C.J. No. 701 [*Twinn* cited to F.C.] at 462.

⁴⁸ *Powley Ont. Sup. Ct.*, *supra* note 20 at para. 64.

exercise s. 35 harvesting rights may not define who the Métis Nation and its members are for all other purposes.”⁴⁹

The Supreme Court accepted the approach for membership from *Vaillancourt* and *O’Neill JJ.* as “[s]elf-identification, ancestral connection, and community acceptance.”⁵⁰ The Supreme Court alluded to the fact that Métis membership has no uniform procedure for recognizing its members and the determination of who is Métis is on a case-by-case basis.⁵¹ It was held that the claim of self-identification should not be of “recent vintage” to merely benefit from the rights under s. 35.⁵² The individual asserting the right must also have an ancestral connection to an historic Métis community.⁵³ The Supreme Court held that the purpose of this requirement “[e]nsures that beneficiaries of s. 35 rights have a real link to the historic community whose practices ground the right being claimed.”⁵⁴

The Supreme Court did not require a minimum blood quantum, but “[r]equired some proof that the claimant’s ancestors belonged to the historic Métis community by birth, adoption, or other means.”⁵⁵ The Métis ancestry of the Powleys was not disputed. Acceptance into a contemporary community established a legal basis for the assertion of the right being claimed. Also “[m]embership in a Métis political organization may be relevant to the question of community acceptance, but it is not sufficient in the absence of a contextual understanding of the membership requirements of the organization and its role in the Métis community.”⁵⁶ The continuance of past traditions and practices can also

⁴⁹ *Powley Ont. C.A.*, *supra* note 25 at para. 152.

⁵⁰ *Ibid.* at para. 30.

⁵¹ *Powley S.C.C.*, *supra* note 1 at para. 29.

⁵² *Ibid.* at para. 31.

⁵³ *Ibid.* at para. 32.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* at para. 33.

show a dedication to traditions of the community.⁵⁷ It was emphasized by the Supreme Court that an ancestral connection to an historic community is imperative in establishing a claim of an Aboriginal right under s. 35.⁵⁸ Further, the Supreme Court upheld the Trial Court's acceptance that, although Powley's ancestors accepted the Robinson-Huron treaty, it did not extinguish their Aboriginal rights. It was up to the Trial Judge to determine whether the Aboriginal rights of the Powleys' were surrendered by their ancestors taking treaty.

2.1.3 Historic government recognition of the Métis.

The Métis people of (what is now known as) Ontario were recognized by the British similarly to other Aboriginal peoples, but the treatment of the Métis changed after 1830.⁵⁹ An example of the recognition of the Métis is found in 1875 when the Dominion government acknowledged them in the Addendum to Treaty 3:

Whereas the Half-breeds above described, by virtue of their Indian blood, claim a certain interest or title in the lands or territories in the vicinity of Rainy Lake and Rainy River, for the commutation or surrender of which claim they ask compensation from the Government.

And whereas, having fully and deliberately discussed and considered the matter, the said Half-breeds have elected to join the treaty made between the Indians and Her Majesty at the North West Angle of the Lake of the Woods, on the third of October, 1873 and have expressed a desire thereto, and to become subject to the terms and conditions thereof in all respects saving as hereafter set forth.⁶⁰

⁵⁷ See *ibid.* where McLaughlin, J. (as she was known then) suggests other means of community acceptance: Other indicia of community acceptance might include evidence of participation in community activities and testimony from other members about the claimant's connection to the community and its culture. The range of acceptable forms of evidence does not attenuate the need for an objective demonstration of a solid bond of past and present mutual identification and recognition of common belonging between the claimant and other members of the rights-bearing community.

⁵⁸ *Ibid.* at para. 34.

⁵⁹ See *Powley Ont. Prov. Ct.*, *supra* note 10 at paras. 48-51 where the treatment of the Métis in the Ontario area changed due to financial considerations of the government of the time.

⁶⁰ "Treaty 3," online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/trts/trty3_e.html> (as of January 15, 2006). See also *Powley supra* note 10 at para. 52.

The Ojibway traditionally recognized the Métis as a distinct part of the territory of what is now Ontario.⁶¹ The treaty negotiations recognized the distinct communities:

As the half-breeds of Sault Ste Marie and other places may seek to be recognized by the Government in future payments, it may be well that I state here the answer that I gave to their demands on the present occasion. I told them that I came to treat with the chiefs who were present, that the money would be paid to them - that their receipt was sufficient for me - that when in their possession they might give as much or little to that class of claimants as they pleased.⁶²

The text of the Robinson-Huron Treaty also makes reference to the Métis in term of half breed:

When at Sault Ste Marie last May (1850) I took measures for ascertaining, as nearly as possible, the number of Indians inhabiting the North shores of the two lakes; and was fortunate enough to get a very correct census, particularly of Lake Superior. The number on that Lake including eighty-four half breeds is only twelve hundred and forty, and on Lake Huron about fourteen hundred and twenty two, including probably two hundred half breeds.⁶³

Recognition by both the government and the traditional keepers of the land (the Ojibway) provided evidence that the Métis were occupants of the Sault Ste. Marie area.⁶⁴

RCAP refers to the evolutionary process that Métis people had undertaken in what is now Canada.⁶⁵ This process led to the establishment of the Métis people. “What distinguishes Métis people from everyone else is that they associate themselves with a

⁶¹ *Ibid.* at para. 54.

⁶² *Ibid.*

⁶³ *Ibid.* at para. 55.

⁶⁴ See *ibid.* at para. 56.

⁶⁵ See *RCAP supra* note 29 at 199-200:

Intermarriage between First Nations and Inuit women and European fur traders and fishermen produced children, but the birth of new Aboriginal cultures took longer. At first, the children of mixed unions were brought up in the traditions of their mothers or (less often) their fathers. Gradually, however, distinct Métis cultures emerged, combining European and First Nations or Inuit heritages in unique ways. Economics played a major role in this process. The special qualities and skills of the Métis population made them indispensable members of Aboriginal /non-Aboriginal economic partnerships, and that association contributed to the shaping of their cultures.... As interpreters, diplomats, guides, couriers, freighters, traders and suppliers, the early Métis people contributed massively to European penetration of North America. The French referred to the fur trade Métis as *coureurs de bois* (forest runners) and *bois brulés* (burnt-wood people) in recognition of their wilderness occupations and their dark complexions. The Labrador Métis (whose culture had early roots) were originally called ‘livyers’ or ‘settlers’, those who remained in the fishing settlements year-round rather than returning periodically to Europe or Newfoundland. The Cree people expressed the Métis character in the term *Otepayemsuak*, meaning the ‘independent ones’.

culture that is distinctly Métis.”⁶⁶ The British also recognized the Métis by providing them with annual presents to secure their alliance.⁶⁷ As well “[f]rom 1824 to 1857, the American government identified and included the Métis of the Upper Great Lakes as beneficiaries of land and/or annuities in at least fifteen different treaties in what is now Michigan, Wisconsin and Minnesota.”⁶⁸ The historic existence of the Métis is acknowledged through the protections recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

2.1.4 Distinct recognition of an historic Métis community.

The Ontario Provincial Court, in accepting the Powleys as Métis, did not want to take a narrow approach to defining a Métis community. The Crown argued that the definition of a Métis community should be limited to only the town site of Sault Ste. Marie. The Provincial Court, however, accepted the argument put forward by the Powley’s counsel, Jean Teillet, that a broader analysis should be embraced:

I find that such a limited regional focus does not provide a reasonable frame of reference when considering the concept of a Métis community at Sault Ste. Marie. A more realistic interpretation of Sault Ste. Marie for the purposes of considering the Métis identity and existence should encompass the surrounding environs of the town site proper.⁶⁹

The importance of establishing an historic community is found in some of the Aboriginal rights principles from *Van der Peet*. The purpose of establishing the existence of an historic community is to provide evidence of the rights that need to be protected by s. 35. The purpose of s. 35 is to protect distinctive societies with their own traditional practices and customs on the land before the arrival of Europeans.⁷⁰

⁶⁶ *Ibid.* at 202.

⁶⁷ See *Powley Ont. Prov. Ct.*, *supra* note 10 at para. 48.

⁶⁸ *Ibid.* at para. 49.

⁶⁹ *Ibid.* at para. 68.

⁷⁰ *Van der Peet*, *supra* note 10 at para. 30 where Lamer C.J.C. held:

The assertion of Aboriginal rights can be made separate from a claim for Aboriginal title.⁷¹ In *Powley*, the courts were concerned with determining whether Métis hunting rights exist in a specific area. Although, the Métis of the Sault Ste. Marie area may have shared in many of the customs of the Ojibway people, the Ontario Superior Court held the Métis were considered a distinct Aboriginal people with different traditions and practices from their First Nations counterparts.⁷² These distinctions led to Métis people living in their own communities apart from the Ojibway.⁷³

In the Ontario Court of Justice the Crown argued that the historic Métis community had disappeared. Along with the disappearance of the community the distinct culture of the Métis had also vanished.⁷⁴ Furthermore, it was contended by the Crown that the re-emergence of Métis people was directly linked to the advantages that can be found through identifying as a Métis person through organizations such as the OMAA and the MNO. The Crown submitted that the present community did not reflect an

In my view, the doctrine of Aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special, legal and now constitutional, status. More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that Aboriginal lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the Aboriginal rights recognized and affirmed by s.35(1) must be directed towards the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.

⁷¹ See *Adams*, *supra* note 18 at 11 para. 26 where the Supreme Court refers to *Van der Peet*:

Where an aboriginal group has shown that a particular activity, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an Aboriginal right to engage in that practice, custom or tradition.

⁷² *Powley* Ont. Sup. Ct., *supra* note 20 at para. 75.

⁷³ See *ibid.* at paras. 74-78 for a specific discussion on the difference between the Ojibway and Métis communities and the areas that they individually occupied.

⁷⁴ *Adams*, *supra* note 18 at para. 31.

historic community and therefore protection of Métis rights under s. 35(1) could not be traced to an historic rights bearing community.

At trial the Powleys submitted historical evidence that showed the existence of an historic Métis community and people that continually acknowledged their mixed blood ancestry.⁷⁵ The Ontario Court of Justice not only accepted that there is a contemporary community, but also indicated that the dissolution of the historic community was related to racism:

As to whether that community is in continuity with the historic Métis community of Sault Ste. Marie, with a distinctive culture in which hunting for food is integral, as I have already indicated, the Trial Judge found as a fact that the contemporary Métis community had always existed, except that it was, until the early 1970's, an invisible entity within the general population, an invisibility (to outsiders) caused by shame, ostracization, and prejudice.⁷⁶

O'Neil J., for the Ontario Court of Justice, added that to deny the existence of historical communities based on shame, ostracization or prejudice would be to deny the reconciliation that the government has stated that must occur between the government and Aboriginal peoples.⁷⁷ He further stated that “[t]o deny people access to their constitutional rights because a community may now only be beginning to put together aspects of its identity and culture is to reward the very practices that the Statement of Reconciliation admits were wrong.”⁷⁸ The Superior Court Judge also agreed with the

⁷⁵ *Powley Ont. Prov. Ct.*, *supra* note 10 at para. 36.

⁷⁶ *Powley Ont. Sup. Ct.*, *supra* note 20 at para 38.

⁷⁷ *Ibid.* at para. 29 where O'Neil J. cited the statement made by the federal government regarding reconciliation:

As Aboriginal and non-Aboriginal Canadians seek to move forward together in a process of renewal, it is essential that we deal with the legacies of the past affecting the Aboriginal peoples of Canada, including the First Nations, Inuit and Métis. Our purpose is not to rewrite history but, rather, to learn from our past and to find ways to deal with the negative impacts that certain historical decisions continue to have in our society today.

⁷⁸ *Ibid.* at para. 30.

lower court decision that hunting was an integral part of the historic Métis community based on the expert historical evidence presented at trial.⁷⁹

In the Ontario Court of Appeal Sharpe J.A. agreed with both the Trial Judge and the Superior Court Judge that historical evidence had clearly shown that an historic Métis community existed. The expert testimony provided by Dr. Ray regarding the historic Métis community was held to be reliable and accurate. The Crown argued that even if there was an historic Métis community, hunting was not an integral part of that community. The Crown contended that the Trial Judge did not properly scrutinize the differences between the Ojibway and Métis cultures.

The Crown suggested that moose hunting was integral to the Ojibway, but it failed to pass over as an integral part of the Métis culture and community.⁸⁰ Sharpe J.A., for the Court of Appeal, rejected the Crown's argument because the Métis are a bi-cultural people and that the practice of hunting passed from the Ojibway to the Métis community with the only exception being the scarcity of moose in the 1820s. The evidence given by Dr. Ray established that hunting was marginally integral to the Métis and should be interpreted in the proper context. The Crown suggested that this statement is fatal to a claim of hunting being integral to the Métis community. Sharpe J.A., for the Ontario Court of Appeal, rejected the Crown's interpretation and established that hunting was only marginal because of the scarcity of game at that period. The lack of a strong moose population at a certain point in time does not limit an Aboriginal right from being shielded by law. Further, the Court of Appeal had noted in *Van der Peet* that a break in the continuity of a practice does not limit the right from being protected.

⁷⁹ See *ibid.* at paras. 39-40.

⁸⁰ *Powley Ont. C.A.*, *supra* note 25 at para. 118.

This position is supplemented by the principle in *Van der Peet* where it was held that the concept of continuity “[d]oes not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions which existed prior to contact.”⁸¹ Trial Judges were directed to adopt flexibility regarding the establishment of continuity. Sharpe J.A. agreed with both the Trial Judge and the Superior Court Judge that the right to hunt was “[i]ntegral to the distinct culture of that community.”⁸²

The Supreme Court worked from the premise that “Aboriginal hunting rights, including Métis rights, are contextual and site-specific.”⁸³ The Supreme Court also accepted the findings of the lower courts regarding the existence of an historic Métis community. It was also held that there were no reviewable errors of finding the historic existence of the community. In order to support a claim of Aboriginal rights the Supreme Court requires that proof of collectivity be provided as to “[t]he shared customs, traditions, and a collective identity.”⁸⁴ Furthermore, “[t]he existence of an identifiable Métis community must be demonstrated with some degree of continuity and stability in order to support a site-specific Aboriginal rights claim.”⁸⁵ The Supreme Court accepted the findings of the Trial Judge regarding the existence of an historic Métis community.

2.1.5 There is a contemporary Métis society at Sault Ste. Marie.

Until the 1970s Canadian history considered the Métis people as the “forgotten people.”⁸⁶ Counsel for the Powleys provided evidence which showed that a

⁸¹ *Van der Peet*, *supra* note 10 at para. 65

⁸² *Powley Ont. C.A.*, *supra* note 25 at para. 127.

⁸³ *Powley S.C.C.*, *supra* note 1 at para. 19.

⁸⁴ *Ibid.* at para. 23.

⁸⁵ *Ibid.*

⁸⁶ *Powley Ont. C.A.*, *supra* note 25 at para 78.

contemporary Métis community does exist. With the establishment of the OMAA and the MNO people began to identify with their Métis roots and felt a renewed sense of belonging to a community.⁸⁷ The establishment of a contemporary Métis society acts as a means to show continuity with the traditional practices of the past.

In the Ontario Court of Appeal the Crown did not agree with the findings of the Trial Judge that there was continuity with an historic Métis community. The Crown maintained that the dispersal of the historic Métis community of 1850 is fatal to the respondent's claim of an Aboriginal right to hunt. It was also claimed that after the signing of the 1850 Robinson-Huron treaty the dispersal of the Métis community to the surrounding reserves destroyed the historic Métis community.⁸⁸ The Trial Judge, as well as Sharpe J.A., rejected this reasoning by the Crown.

The first reason for the rejection of the dispersal argument was that not all Métis moved to reserves. Second, the Métis that moved to the reserves were still seen as Métis by the Ojibway and the Crown. Although, Métis people did move to the reserves, they did not necessarily lose their traditions, customs and practices. Sharpe J.A. agreed with the Trial Judge that the history of the Métis must be considered in any dissolution theory of the historic Métis community:

Not only was the Trial Judge entitled to take into account the evidence of the severe prejudice and discrimination inflicted upon the Métis: it is my view that it would have been quite wrong for him to ignore it. The constitutional recognition of the existence of the Métis as one of Canada's Aboriginal peoples may not be capable of redressing all the wrongs of the past, but it cannot be that when interpreting the constitution, a court should ignore those wrongs.⁸⁹

⁸⁷ See *ibid.* at para. 80.

⁸⁸ See *Powley Ont. Sup. Ct. supra* note 20 at para. 132.

⁸⁹ *Powley Ont. C.A., supra* note 25 at para. 136. Also see *Sparrow, supra* note 9 at 177 where Dickson C.J.C. states: "[F]or many years, the rights of the Indians to their Aboriginal lands -- certainly as legal rights -- were virtually ignored."

Sharpe J.A. ruled that the continuity test must be applied with flexibility when dealing with the historic wrongs that have faced Métis and other Aboriginal peoples.⁹⁰

The Crown also argued that the Powleys' ancestors accepted the Robinson-Huron treaty in 1850 and therefore have no Aboriginal rights. Sharpe J.A. firmly rejected this notion of the extinguishment of Métis identity or Aboriginal rights simply by accepting treaty:

Robinson, the treaty commissioner, refused to deal with the Métis as a group. He told the Métis that individuals could 'take treaty' if the Ojibway Chiefs agreed, but it was never suggested that a consequence of taking treaty would be the extinguishment of their Métis identity. There is also no evidence that Métis individuals were advised that they needed to make an election either to stay Métis or take treaty.⁹¹

Moreover, he held that not only did the ancestors of the Powleys maintain their Aboriginal rights, but the practice of hunting was a tradition that is continued today and remains an integral part of the Métis community.

The Crown contended that the Trial Judge erred in accepting the Powleys as members of the modern Métis community. The evidence relied on at trial was Steve Powley's membership cards with the OMAA and the MNO. In Steve Powley's application form to the OMAA he wrote that the reason for applying for membership was to "[p]reserve my aboriginal heritage and the right to harvest natural resources that my family has done since time immemorial."⁹² Sharpe accepted this as evidence that transcends mere proof of formal membership. Sharpe J.A. disagreed with the Crown that this acceptance was a palpable and overriding error regarding community acceptance; rather he accepted that evidence supported the Trial Judge's finding that there was community acceptance of Powley.

⁹⁰ *Powley, ibid.* at para. 136.

⁹¹ *Ibid.* at para. 139.

⁹² *Ibid.* at para. 147.

Sharpe J.A. agreed that this evidence alone was not sufficient to claim protection of a site specific and historic community right under s. 35. Sharpe J.A., however, did not accept that membership in Métis communities is comparable to those implemented by the federal government for *Indian Act* Band membership. Evidence produced by Art Bennett at trial established that the OMAA does not hold itself out to be the community; rather, the community has always been there and the purpose of the OMAA is to politically unite Métis people.⁹³

The Supreme Court recognized that Aboriginal rights are collective communal rights. “They must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual’s ancestrally based membership in the present community.”⁹⁴ The Supreme Court accepted the Trial Judge’s finding that although the historic Métis community was not entirely visible, “[t]here was never a lapse; the Métis community went underground, so to speak, but it continued.”⁹⁵ The Trial Judge found that the expert evidence explained the break in continuity and this finding was accepted by the higher Courts.

2.1.6 The relevant time/date for determining the existence of the right.

In establishing the time frame for the existence of an Aboriginal right the *Van der Peet* test is the measure that the courts are required to use. The application of this test in a strict sense would not allow the Métis to make claims. It was decided in *Van der Peet* that the tradition, customs and practices at the time of first contact was the gauge of what rights are to be given protection. The Supreme Court recognized the problems that Métis claims may have in meeting this requirement and suggested that the *Van der Peet* test be

⁹³ *Ibid.* at para. 146.

⁹⁴ *Powley S.C.C.*, *supra* note 1 at para. 24.

⁹⁵ *Ibid.* at para. 27.

modified when a Métis case did come before the Supreme Court. The Métis were some of the first people of European descent to have relationships with First Nations and the first communities to be recognized as outside of First Nations' control:

Although s.35 includes the Métis within its definition of 'aboriginal peoples of Canada', and thus seems to link their claim to those of other Aboriginal peoples under the general heading of 'aboriginal rights', the history of the Métis and the reasons underlying their inclusion in the protection given by s.35, are quite distinct from those of other Aboriginal peoples in Canada. As such, the manner in which the Aboriginal rights of other Aboriginal peoples are defined is not necessarily determinative of the manner in which the Aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s.35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s.35's protection of the Aboriginal rights of the Métis people, and answer the question of the kind of claims which fall within s.35(1)'s scope when the claimants are Métis. The fact that, for other Aboriginal peoples, the protection granted by s.35 goes to the practices, traditions and customs of Aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question. It may, or it may not, be the case that the claims of the Métis are determined on the basis of the precontact practices, traditions and customs of their Aboriginal ancestors; whether that is so must await determination in a case in which the issue arises.⁹⁶

The measure that the Provincial Court chose to apply was the date of effective control by Europeans. The Trial Court again relied on expert evidence provided by Dr. Ray that established effective control by Europeans over the territory occurred sometime between 1815 and 1850.⁹⁷ The Court accepted that the distinctive Métis community existed at this time. The trial Court then turned its attention to "[w]hether hunting for food was a practice that was integral to the Métis society at the time when effective control of the area was taken over by the European based culture."⁹⁸

In the Ontario Superior Court of Justice the Crown framed the source of the right from the period of 1815 to 1850. The Crown contended that the participation of the Métis in the historic Sault Ste. Marie community were positions of "wage earning

⁹⁶ *Van der Peet*, *supra* note 10 at para. 67.

⁹⁷ See *Powley Ont. Prov. Ct.*, *supra* note 10 at para. 90.

⁹⁸ *Ibid.* para. 91.

labourers, independent traders, and skilled tradesmen.”⁹⁹ Further, the Crown also argued that the participation of the Métis in the community was “marginal” and that the hunting was incidental and of “marginal significance.”¹⁰⁰ Dr. Ray provided evidence for the Powleys, which guided the Trial Court with the basis to override the line of reasoning submitted by the Crown in its appeal:

I think the better way to think about it is that these people had a livelihood based on living off the land and they also had the attitude that you took what the land offered....
[T]hroughout the period from the 1820's through to the Robinson Treaty period is a time when game is . . . game is quite scarce. Furs are scarce. Beaver is not abundant for most of these areas . . . One of the results of the period of high competition, that is the period say 1780's, '90's to 1821 lead to short-term depletion of fur and game in the region and one of the results of that is the Native economies, that would be Ojibway and Métis, were forced to change over from, or, let's put it this way, the relative significance of large game in the economy diminished in this period and fish and small game were relatively more important simply because that's what was primarily available . . . so that it's not to say large game hunting stops.

It's clearly a low point in the fur and game cycle. It also points out, again a point I was trying to make yesterday, I'll go back and highlight what he says here, the scarcity makes it 'out of the power of the best hunter to provide a sufficiency to maintain himself & a family'. That is out of hunting and trapping alone, so again, it's the diversified economy of the Indian and Métis. Indians and Métis here which was the key to their survival.¹⁰¹

The Superior Court held that “[t]he evidence...supported the contention that hunting was of central significance to the Métis, and integral to their distinctive society. The Trial Judge’s findings in this regard do not demonstrate palpable or overriding error, and ought not to be disturbed.”¹⁰²

The Ontario Court of Appeal upheld the Crown’s contention that 1850 is the appropriate time frame for the consideration of the right. In arriving at this decision, the Court of Appeal rejected the Congress of Aboriginal Peoples intervenor’s submission that the date should be July 1, 1867. The court held that “[p]ostponing the date to a point well after the assertion of sovereignty and effective control is supported neither by the case

⁹⁹ *Powley Ont. Sup. Ct., supra* note 20 at para. 20a.

¹⁰⁰ See *ibid.*

¹⁰¹ *Ibid.* at para. 25.

¹⁰² *Ibid.* at para. 26.

law nor by any discernable relevant principle and I would reject it.”¹⁰³ It can be argued that the Robinson-Huron Treaty does not show effective control of either First Nations or Métis people: treaties are based on consensual relationships; not coercion or control.

The time frame of the *Van der Peet* test was modified for Métis claims. The Court of Appeal elaborated on the test for the Métis:

[T]he test for Métis practices should focus on identifying those practices, customs and traditions that are integral to the Métis community’s distinctive existence and relationship to the land. This unique history can most appropriately be accommodated by a post contact but pre-control test that identifies the time when Europeans effectively established political and legal control in a particular area. The focus should be on the period after a particular Métis community arose and before it came under the effective control of European laws and customs.¹⁰⁴

The source of control is somewhat convoluted in this statement by the Court of Appeal. British Imperial law is distinct from French civil law or the laws of other European countries, which European’s laws are being referred to?

In the Supreme Court the Crown argued that the appropriate test for determining Métis rights is the pre-contact test. The Supreme Court rejected this submission by the Crown. “This theory in effect would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1).”¹⁰⁵ It was acknowledged by the Supreme Court that the hunting practice was both an Ojibway and Métis custom.

[A]s long as the practice grounding the right is distinctive and integral to the pre-control Métis community, it will satisfy this prong of the test. This result flows from the constitutional imperative that we recognize and affirm the Aboriginal rights of the Métis, who appeared after the time of first contact.¹⁰⁶

¹⁰³ *Ibid.* at para. 97.

¹⁰⁴ *Powley S.C.C.*, *supra* note 1 at para. 37.

¹⁰⁵ *Ibid.* at para. 38.

¹⁰⁶ *Ibid.* at para. 38.

The Supreme Court further accepted the Trial Judge's finding that the date of effective control was 1850 in the contested geographical area, which is the time of the Ojibway-Robinson Treaty with the Imperial Crown.

2.1.7 Characterization of the Constitutional Right.

The Powleys sought to assert a constitutionally protected right to hunt for food. This intent was evidenced by the Powleys attaching a tag to the moose's ear stating that it was food for the winter.¹⁰⁷ Judge Vaillancourt, of the Provincial Court, referred to expert testimony: "[E]vidence indicated that the Ojibway and Métis had always hunted and that this activity was a [*sic*] integral part of their culture prior to the intervention of European control."¹⁰⁸ Further, evidence suggested that between 1820 and 1880 that moose were scarce; the Crown contended that hunting moose would not have been an integral part of the Métis culture. This approach was rejected by the court:

I find that to take this approach one must suspend common sense. I take the position that just because a particular species is in short supply or temporarily in a state of great depletion that does not eliminate that particular animal as a hunted species by the Aboriginal group.¹⁰⁹

Specifically, the Provincial Court held that "[t]he right to hunt is not one that is game specific."¹¹⁰ The traditional hunt for food was based on what was available to be killed by an Aboriginal group at the time.

The Powleys argued that they have a right to hunt under the 1850 Robinson-Huron Treaty in addition to an Aboriginal right to hunt. It was contended that they are descendants of the Lesage family who were signatories to the treaty. The Trial Court,

¹⁰⁷ See *Powley Ont. C.A.*, *supra* note 25 at para 92.

¹⁰⁸ *Powley Ont. Prov. Ct.*, *supra* note 10 at para. 93.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.* at para. 94.

however, relied on an interpretation of the treaty that specifically excluded Métis from being included in the treaty right to hunt.¹¹¹

The Ontario Superior Court of Justice affirmed the ruling of the lower court. In doing so, it held that to acknowledge that the lower court erred regarding the characterization of the right would be to disregard the principles set out in *Sparrow*.¹¹² Further, regarding: “[a]ny test for Métis rights in s. 35 must be in the context of a large and liberal interpretation that fulfils the purpose of the rights recognized and affirmed by that provision.”¹¹³ In making a determination that the Métis used hunting as a means for sustenance, reference is made to the Trial Judge’s reliance on the expert evidence of Mr. Long:

[T]he fact that moose were scarce if not non-existent between 1820 and 1880 thereby creating a scenario whereby at the time of effective control of the area passing from the Aboriginal people moose hunting would not be a part of their culture. I find that to take this approach one must suspend common sense. I take the position that just because a particular species is in short supply or temporarily in a state of great depletion that does not eliminate that particular animal as a hunted species by the Aboriginal group.¹¹⁴

The evidence adduced at trial was held to be sufficient that hunting was a practice of the historic Métis community.

At the Ontario Court of Appeal the Crown and the Powleys disagreed on the proper characterization of the right being asserted. The Crown argued that the right should be narrowed specifically to the harvesting of moose; however, the appellant

¹¹¹ *Ibid.* at para 100 per Judge Vaillancourt: “As I understand the evidence regarding the Robinson Huron Treaty 1850, Robinson made it very clear that he did not want the Métis included as part of the Treaty.” However, it must be realized that this is the perspective of one side of the treaty negotiations and not necessarily representative of the First Nations’ perspective.

¹¹² See *Powley Ont. Sup. Ct.*, *supra* note 20 at para. 22 where the court refers to the guidelines from *Sparrow*: “1) the fiduciary duty owed by the Crown to aboriginal peoples, 2) the rejection of the ‘frozen rights’ theory of aboriginal rights, and 3) the importance of the aboriginal perspective on those rights.”

¹¹³ *Ibid.* at para. 23.

¹¹⁴ *Ibid.* at para. 24.

contended that the right should be seen more generally as a right to hunt for food.¹¹⁵

Sharpe J.A. relied on *Van der Peet* where Lamer C.J.C. discussed the characterization of Aboriginal rights:

To characterize an appellant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right.¹¹⁶

Lamer C.J.C. cautioned about the characterization of an Aboriginal right

[m]ust be undertaken with some caution. In order to inform the court's analysis the activities must be considered at a general rather than at a specific level. Moreover, the court must bear in mind that the activities may be the exercise in a modern form of a practice, custom or tradition that existed prior to contact, and should vary its characterization of the claim accordingly.¹¹⁷

Sharpe J.A. emphasized the principle from *R. v. Pamajewan*¹¹⁸ that a right needs to be properly characterized to avoid over generality. In addition, to the characterization of the right, the Aboriginal or Métis perspective must be considered by an adjudicator.¹¹⁹

Sharpe J.A. found that to limit the Aboriginal right of the Métis to hunt moose would unfairly place emphasis upon the regulatory scheme implemented by Ontario. Such an approach to limit the right to being game specific would not embrace the Aboriginal perspective. Regarding the nature of the right he stated:

A traditional Aboriginal practice may involve what is, from the Aboriginal perspective, a single identifiable activity that has a particular meaning or significance to the Aboriginal community. From a modern regulatory perspective, that same activity may be viewed as a collection of discrete practices that are accorded disparate treatment.¹²⁰

¹¹⁵ See *Powley Ont. C.A.*, *supra* note 25 at para. 106.

¹¹⁶ *Van der Peet*, *supra* note 10 at para. 53.

¹¹⁷ *Ibid.* at para. 53.

¹¹⁸ See *R. v. Pamajewan*, [1996] 4 C.N.L.R. 164, [1996] 2 S.C.R. 821 at 834 at 172. [*Pamajewan* cited to C.N.L.R.].

¹¹⁹ See *Van der Peet*, *supra* note 10 at para. 49 where Lamer C.J.C. held: "In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the Aboriginal people claiming the right". Also see *Sparrow* *supra* note 9 per Dickson C.J.C. and La Forest J. where it was stated that: "[It is] crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."

¹²⁰ *Powley Ont. C.A.*, *supra* note 25 at para. 111.

Sharpe J.A. supplemented this finding with the expert evidence provided at trial that hunting was opportunistic in the sense that the Métis and Ojibway hunted what game was available. Dr. Ray Stated:

Ojibway and Métis were forced to change over from, or, let's put it this way, the relative significance of large game in the economy diminished in this period and fish and small game were relatively more important simply because that's what was primarily available . . . so that it's not to say large game hunting stops.¹²¹

Sharpe J.A. referred to the multitude of cases that characterize the right to hunt or fish for food as not being species specific.¹²² Although, the Court of Appeal ruled that Métis Aboriginal rights must be dealt with independently of First Nations' Aboriginal rights; the 'spirit' of the *Van der Peet* test still applied.

Characterization of the right is the first step in the analysis of an Aboriginal right.¹²³ The Supreme Court accepted that the respondent tagged the ear of the moose which stated that the moose was food for the winter. The Supreme Court characterized the right as a right to hunt for food. The right claimed is a general right to hunt and not a specific right to harvest moose. The Powleys did not need to seek the permission of the Métis community to hunt for a moose. This shows that the nature of the right being asserted in this case is an individual one that is not gender limited.

¹²¹ *Powley* Ont. Sup. Ct., *supra* note 20 at para. 25.

¹²² See *Van der Peet*, *supra* note 10 at para. 76, where the right is characterized as "[a]n aboriginal right to exchange fish for money or for other goods." See also *Adams*, *supra* note 18 at 15 where Lamer C.J.C. held "[t]he appellant's claim is best characterized as a claim for the right to fish for food in Lake St. Francis. See also *Côté*, *supra* note 18 at 49 where Lamer C.J.C. interpreted the claim as "[a]n aboriginal right to fish for food within the lakes and rivers" of their territory. See also *Sparrow*, *supra* note 9 at 176 where Dickson C.J.C. specified the issue of the rights as "[t]he existing aboriginal right to fish for food and social and ceremonial purposes." See also *R. v. Gladstone*, [1996] 2 S.C.R. 723, [1996] 4 C.N.L.R. 65 at 744 [*Gladstone* cited to S.C.R.] where the characterization of the claim was held to be "[t]he exchange of herring spawn on kelp for money or other goods, but the practice itself was so unusual and specific that it is difficult to know how else it could be described. In treaties and treaty cases, the right is commonly characterized as to the right to hunt or fish for food." See also *R. v. Marshall*, [1999] 4 C.N.L.R. 161, [1999] 3 S.C.R. 456 at 168 [*Marshall* cited to C.N.L.R.].

¹²³ *Van der Peet*, *supra* note 10 at para. 76 per Lamer C.J.C.

2.1.8 The right claimed is an integral practice, custom or tradition to the Métis.

The Supreme Court in *Van der Peet* has set the threshold for the evidence required for Aboriginal claimant to prove that a tradition, practice or custom was ‘integral or distinctive’ to its society:

The claimant must demonstrate that the practice, tradition or custom was a central and significant part of the society’s distinctive culture. He or she must demonstrate, in other words, that the practice, tradition or custom was one of the things which made the culture of the society distinctive - that it was one of the things that truly made the society what it was.¹²⁴

At trial Judge Vaillancourt held that the expert historical evidence presented to the court was consistent with hunting being an integral part of Métis society prior to the assertion of effective control by Europeans.¹²⁵

In order to determine whether the practice, custom or tradition was part of the Métis distinctive culture the Trial Court relied on expert testimony. Dr. Ray

[t]estified that the economy of the Métis people in Sault Ste. Marie historically was similar to the Ojibway economy. He pointed out that the relative importance of fishing or hunting or trapping or collecting would depend on a number of factors in any given year. Game cycles, fish cycles and fur cycles would impact on their activities.¹²⁶

Justice O’Neil of the Ontario Court of Justice cited Judge Vaillancourt’s reliance on historic evidence from trial that he used to establish hunting as a traditional practice of the Métis. “I think the better way to think about it is that these people had a livelihood based on living off the land and they also had the attitude that you took what the land offered . . .”¹²⁷ Dr. Ray was also asked about the significance of the hunt to the Métis.

Q: One must question, Dr. Ray, can you say that hunting is integral to the Métis society here?

A: It certain was . . . at that time it was an integral part of it and I would say that . . . the trouble I have with a question like that is it segments the economy which is a . . . which is a distortion of the reality. The economy was based on the right to live off the land, whether it meant hunting, fishing, trapping and the relative importance of any one of

¹²⁴ *Ibid.* at para. 55.

¹²⁵ *Powley Ont. Prov. Ct.*, *supra* note 10 at para. 104.

¹²⁶ *Ibid.* at para. 101.

¹²⁷ *Powley Ont. Sup. Ct.*, *supra* note 20 at para. 25.

those activities in any year over a period of years would depend on the game cycles, economic conditions and so on, so that that was . . . to me the hunting right is bundled into those rights. I don't think they could have understood, I'm certain . . . neither the Métis or the Ojibway would have probably found it hard to imagine that, how can we be allowed to do one and not the other . . . and so, yes, I would say as a bundle of livelihood rights, it would have been a part of it and I don't imagine they would have considered it separated out.¹²⁸

Relying on the evidence the Ontario Superior Court ultimately held that “[a] careful review of the evidence of trial demonstrates it supported the contention that hunting was of central significance to the Métis, and integral to their distinctive society.”¹²⁹

In the Ontario Court of Appeal the Crown attacked the findings of the Trial Judge regarding the relevance of the hunting to the Métis:

First, the appellant submits that the Trial Judge failed to distinguish between the culture and practices of the Ojibway and the Métis. It is the appellant's contention that while the evidence may have established that moose hunting was integral to the Ojibway culture, it did not survive as a practice integral to the Métis. Second, the appellant argues that the Trial Judge erred by applying too lax a test of “integral”. The appellant's position is that during the crucial years of the first half of the 19th century, moose hunting was virtually non-existent and hunting generally was at best a “marginal” activity. The appellant says that the Trial Judge simply set the bar too low in concluding that hunting played a sufficiently significant aspect of the Métis culture to satisfy the integral test.¹³⁰

The Court of Appeal rejected the Crown's argument that there was no continuity of the practice of hunting. The practice was seen as something that continued on in the Métis community once it began to form its distinctive practices.

An examination of the term integral was done in *Van der Peet*. The Court of Appeal referred to Lamer C.J.C.:

To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was.¹³¹

¹²⁸ *Ibid.*

¹²⁹ *Ibid.* at para. 26.

¹³⁰ *Powley Ont. C.A.*, *supra* note 25 at para. 118.

¹³¹ *Van der Peet*, *supra* note 10 at para. 56. See also in the same citation where Lamer C.J.C. stated:

The Crown argued that hunting was not a defining feature to the Métis community.¹³² This assertion by the Crown was based on the testimony given by Dr. Ray when he called hunting a marginal activity just before 1850. The Court of Appeal held that the statement must be read in its proper context. Hunting might have been marginal due to environmental limitations on particular game to hunt; if hunting was not fruitful then fishing could be relied on for sustenance. As Dr. Ray testified:

You had to shift your hunting and fishing strategies as the resource cycles shifted in response to game population cycles. ... it's clear that hunting pressures caused part of this trouble, but it's also a known fact that all game species go through cyclical population fluctuations irregardless of whether or not they're being hunted or trapped. ... flexibility is the key and in the interior area this meant, among other things, that they had to depend on things other than the large game in the hunting economy.¹³³

The Court of Appeal also held that reliance on resources for sustenance can be used to determine an integral practice for a society. The Court of Appeal also applied the principle from *Van der Peet* which held that there can be a break in the continuity of a practice and still have a right established. “[T]he concept of continuity does not require

This aspect of the integral to a distinctive culture test arises from the fact that aboriginal rights have their basis in the prior occupation of Canada by distinctive aboriginal societies. To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1).

¹³² See *ibid.* at para. 70 where Lamer C.J.C. elaborated on how a practice must be a defining feature of a culture:

In identifying those practices, customs and traditions that constitute the aboriginal rights recognized and affirmed by s. 35(1), a court must ensure that the practice, custom or tradition relied upon in a particular case is independently significant to the aboriginal community claiming the right. The practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition but must rather be itself of integral significance to the aboriginal society. Where two customs exist, but one is merely incidental to the other, the custom which is integral to the aboriginal community in question will qualify as an aboriginal right, but the custom that is merely incidental will not. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.

¹³³ *Powley Ont. C.A.*, *supra* note 25 at para. 124.

aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions which existed prior to contact.”¹³⁴ Adaptability to harvest what game or species was available was seen as a part of the exercise of the right to hunt.¹³⁵

The Supreme Court agreed that the practice of hunting for food was consistent even though it may have been limited due to environmental factors over the years. The expert evidence was accepted that sustenance hunting was of “pinnacle importance” to the Métis.¹³⁶ The Supreme Court also accepted the findings of the lower courts that hunting was an integral part of the Métis society in 1850. The Supreme Court referred to the evidence from the Lytwyn report where hunting was described.

In the mid-19th century, the Métis way of life incorporated many resource harvesting activities. These activities, especially hunting and trapping, were done within traditional territories located within the hinterland of Sault Ste. Marie. The Métis engaged in these activities for generations and, on the eve of the 1850 treaties, hunting, fishing, trapping and gathering were integral activities to the Métis community at Sault Ste. Marie.¹³⁷

This evidence was seen as supporting the position of the Trial Judge that hunting was an important part of the Métis community.

2.1.9 The Métis continue to exercise the tradition of the hunt.

In determining whether the Métis in the Sault Ste. Marie area continued to exercise their right to hunt the Trial Court referred to two sources. First, the Court relied on census records from the years 1861, 1881, and 1891 that showed some Métis people listed as hunters. Second, the Trial Court relied on historical evidence produced that showed Métis people had continued harvesting game into modern times.¹³⁸ The

¹³⁴ *Van der Peet*, *supra* note 10 at para. 65.

¹³⁵ See *Powley Ont. C.A.*, *supra* note 25 at para. 126.

¹³⁶ See *ibid.* at paras. 41-44 for the historical evidence relied on by the court.

¹³⁷ *Powley S.C.C.*, *supra* note 1 at para. 43.

¹³⁸ See *Powley Ont. Prov. Ct.*, *supra* note 10 at para. 106.

historical evidence was supplemented by the Powleys tagging their moose that clearly stated it was food for the winter. These facts led the Trial Judge to conclude that the practice of hunting is still exercised.

The reliance on evidence given at trial by experts led the Superior Court to hold that there is a modern day exercise of hunting rights.

- Q: Now, Mr. Bennett, when you were a kid growing up and hunting with your uncles, what would you . . . could you give us an estimate of what percentage of your diet, I guess the protein of your diet, or basically your diet came from what we might call bush foods or from your . . . the animals you hunted and fished?
- A: As a child or now?
- Q: Well, like both actually.
- A: Okay, when I was kid. probably the meat and fish we ate, I bet you 90% of what we ate come out of the bush. Now, I'd say probably around 75, 80%. I actually prefer the taste of moose, even venison, I even prefer venison over moose. If anybody's a connoisseur of wild game, I'm . . . venison tastes better than moose, but ya, probably 75 to 80% of the meat we consume now is wild game, including fish.
- Q: Do you think that Métis people are out on the land a lot, Mr. Bennett?
- A: Yes, we are.
- Q: Do you think they're out on the land just as much or more than M.N.R. officers are?
- A: Cause we live on it, they don't. They're just there visiting.¹³⁹

Based on this evidence, and other testimony about similar issues, the Judge of the Superior Court accepted the findings of the Trial Court.

The Court of Appeal agreed with the approach that the Trial Judge took in considering the continuance of a connection with an historic Métis community:

First, the Trial Judge found that it was appropriate to consider Métis presence in the area immediately surrounding Sault Ste. Marie, especially the neighboring Indian reserves, and not to restrict the inquiry to the town site of Sault Ste. Marie proper. Second, the Trial Judge took into consideration certain social and political factors that discouraged a visible Métis presence and impeded the growth or development of an independent and distinctive Métis community.¹⁴⁰

The Crown argued that the Métis had not just disappeared; rather, they had continued to live in places around Sault Ste. Marie and that the Métis community had disintegrated:

[B]y the later half of the 19th century, the Batchewana and Garden River bands had become the new home for many who had formerly lived in the historic Métis community. The bands carried on certain aspects of the Métis culture and traditional practices, blended with Ojibway culture and

¹³⁹ Powley Ont. Sup. Ct., *supra* note 20 at para. 39.

¹⁴⁰ Powley Ont. C.A., *supra* note 25 at para. 129.

practices. Today, many well-known names from the historic Sault Ste. Marie community are carried on by members of both of these bands, including both chiefs and several counsellors.¹⁴¹

Expert witnesses provided by the Crown testified to the fact that many Métis people moved to the surrounding Indian reserves.¹⁴² The Crown contended that the signing of the Robinson-Huron treaty and the relocation of Métis people to reserves created a break in the continuity to the Métis community. Therefore, there can be no tie to the historic community to establish an Aboriginal right to hunt.

In considering this argument the Court of Appeal relied on census records that established that not all Métis moved to reserves. Furthermore, even those Métis that did move to the reserve were still seen as being Métis and not Indian.¹⁴³ The Métis did not become completely assimilated into the surrounding reserves and the Métis community continued in the Sault Ste. Marie area in a diminished roll.¹⁴⁴ The Court of Appeal also held that the Trial Judge correctly took into account the political turmoil that the Métis were subjected to by the Dominion of Canada at Batoche and Red River. These events led to the execution of the charismatic leader of the Métis: Louis Riel.

The Métis faced a dual rejection from society:

The respondents led the evidence of Olaf Bjornaa who testified that he and his sister were denied access to the reserve school because they were not 'Indian' but were also rejected by the town school because they were too 'Indian'. There was considerable evidence from lay and expert witnesses that the Métis people have been the victims of discrimination, ostracism and overt hostility from the 19th century forward.¹⁴⁵

The Court of Appeal held that consideration of this evidence was necessary for the Trial Judge to make determinations regarding the apparent lack of a visible Métis community and the application of the continuity requirements from *Van der Peet*.

¹⁴¹ *Ibid.* at para. 130.

¹⁴² See *ibid.* para. 131.

¹⁴³ See *ibid.* where the decision refers to *RCAP*, *supra* note 29 at 261, after 1875, the government, "made a major effort to eliminate Métis people from the rolls."

¹⁴⁴ *Powley Ont. C.A.*, *ibid.* at para. 133.

¹⁴⁵ *Ibid.* at para. 134.

[T]he continuity test should be applied with sufficient flexibility to take into account the vulnerability and historic disadvantage of the Métis. The Trial Judge was entitled to conclude that the Sault Ste. Marie Métis community had suffered as a result of what was at best governmental indifference, and to take the historically disadvantaged situation of the Métis into account when assessing the continuity of their community.¹⁴⁶

The Supreme Court agreed with the Trial Court Judge that there is a modern day right to hunt for the Métis of Sault Ste. Marie. Section 35 is to act as more than a codification of the common law:

Section 35 reflects a new promise: a constitutional commitment to protecting practices that were historically important features of particular Aboriginal communities. A certain margin of flexibility might be required to ensure that Aboriginal practices can evolve and develop over time, but it is not necessary to define or to rely on that margin in this case. Hunting for food was an important feature of the Sault Ste. Marie Métis community, and the practice has been continuous to the present. Steve and Roddy Powley claim a Métis Aboriginal right to hunt for food. The right claimed by the Powleys falls squarely within the bounds of the historical practice grounding the right.¹⁴⁷

The Supreme Court also embraced the approach taken by the Trial Court in determining the historical factors that affected the historic Métis communities. That is, historical factors must be taken into account in order to adequately protect the traditions, practices and customs that existed before the date of effective control. Section 35 is a constitutional commitment to protect historic rights of Aboriginal peoples. It was accepted that hunting for food was an important part of the Métis culture historically and in modern times.

2.1.10 The Métis right has not been extinguished.

The Trial Judge ruled that there was no evidence presented at trial that the right to hunt had been extinguished. The Crown argued that if the Powleys are maintaining a right to hunt through the Robinson-Huron Treaty of 1850, then the rights were extinguished by annuity payments from the Chiefs. The Trial Court rejected the treaty right extinguishment argument because the Powleys are not beneficiaries of the treaty.

¹⁴⁶ *Ibid.* at para. 136.

¹⁴⁷ *Powley S.C.C.*, *supra* note 1 at para. 45.

The Trial Judge referred to *R. v. Fowler*¹⁴⁸ and *R. v. Chevrier*¹⁴⁹ where it was “[r]uled that treaty rights are inherited and are not determined by whether or not an individual Aboriginal person is listed as an Indian under the *Indian Act*.”¹⁵⁰ The Trial Judge also found that the Powleys do not have a treaty right to hunt because the intent of the Robinson-Huron Treaty was to exclude the Métis:

As the half-breeds of Sault Ste Marie and other places may seek to be recognized by the Government in future payments, it may be well that I state here the answer that I gave to their demands on the present occasion. I told them that I came to treat with the chiefs who were present, that the money would be paid to them - that their receipt was sufficient for me - that when in their possession they might give as much or little to that class of claimants as they pleased.¹⁵¹

The Trial Judge reasoned that the Powleys may have relatives that were signatories to the treaty, but the Powleys are now Métis and were excluded from treaty benefits. Subsequently, the Ontario Superior Court, the Ontario Court of Appeal and the Supreme Court all agreed that the Métis were not meant to be included in the Robinson-Huron Treaty. However, the Supreme Court also emphasized that taking treaty does not unilaterally extinguish Métis or Aboriginal rights:

We emphasize that the individual decision by a Métis person’s ancestors to take treaty benefits does not necessarily extinguish that person’s claim to Métis rights. It will depend, in part, on whether there was a collective adhesion by the Métis community to the treaty. Based on the record, it was open to the Trial Judge to conclude that the rights of Powleys’ ancestors did not merge into those of the Indian band.¹⁵²

Ultimately, the Supreme Court accepted the determination by the Trial Judge regarding the existence of Métis Aboriginal rights after the Powleys’ ancestors took treaty.

An Aboriginal right to hunt can not be unilaterally extinguished by regulatory schemes implemented by provincial governments as held in *Sparrow*.¹⁵³ Section 35 is in

¹⁴⁸ See *R. v. Fowler*, [1993] 3 C.N.L.R. 178, [1993] N.B.J./A.N.B. No. 85 (Prov. Ct.).

¹⁴⁹ See *R. v. Chevrier*, [1989] 1 C.N.L.R. 128, [1988] O.J. No. 1792 (Dist. Ct.).

¹⁵⁰ *Powley Ont. Prov. Ct.*, *supra* note 10 at para. 98.

¹⁵¹ *Ibid.* at para. 55.

¹⁵² *Powley S.C.C.*, *supra* note 1 at para. 35. But see, *Bear Island Foundation*, *supra* note 30.

¹⁵³ See *Sparrow*, *supra* note 9 at 174.

place to protect Aboriginal rights from unilateral extinguishment by provincial legislation. Therefore, the Trial Judge held: “There was no evidence adduced at trial to suggest that the hunting rights of the Métis have been extinguished.”¹⁵⁴ At the Ontario Superior Court of Justice the Crown “[a]ccepted that if the respondents were acting pursuant to an aboriginal right it was not extinguished and it was infringed by ss. 46 and 47(1) of the Act.”¹⁵⁵ In the Court of Appeal the Crown did not argue that the Aboriginal right of the Powleys had been extinguished.¹⁵⁶ The Supreme Court, however, held that:

The doctrine of extinguishment applies equally to Métis and to First Nations claims. There is no evidence of extinguishment here, as determined by the Trial Judge. The Crown’s argument for extinguishment is based largely on the Robinson-Huron Treaty of 1850, from which the Métis as a group were explicitly excluded.¹⁵⁷

2.1.11 The regulatory scheme infringed the preferred method of exercising the practice, custom or tradition of the Métis and was not justified.

If an Aboriginal right has not been extinguished prior to 1982, it can still be infringed by government action if legislation can be justified.¹⁵⁸ The Government of Ontario failed to affirm or recognize Métis rights in the *Game and Fish Act*.¹⁵⁹ In *Sparrow* the Supreme Court considered the implications of regulatory schemes regarding fishing. “The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1).”¹⁶⁰ Judge Vaillancourt held that the Métis right to hunt had been unjustifiably infringed by the Ontario government:

¹⁵⁴ *Powley Ont. Prov. Ct.*, *supra* note 10 at para. 108.

¹⁵⁵ *Powley Ont. Sup. Ct.*, *supra* note 20 at para. 8.

¹⁵⁶ See *Powley Ont. C.A.*, *supra* note 25 at para. 85.

¹⁵⁷ *Powley S.C.C.*, *supra* note 1 at para. 45.

¹⁵⁸ See *Delgamuukw v. B.C.*, [1998] 1 C.N.L.R. 14, [1997] 3 S.C.R. 1010 at 75 [*Delgamuukw* cited to C.N.L.R.].

¹⁵⁹ See *Powley Ont. Prov. Ct.*, *supra* note 10 at para. 110. See also para. 112 where the Minister of Natural Resources wrote on December 21, 1995 that “... At the present time, the Ontario Government does not recognize Métis people as having any special access rights to natural resources.”

¹⁶⁰ *Sparrow*, *supra* note 9 at 182.

I find that the Métis' Aboriginal right to hunt moose and other game is interfered with by the regulatory scheme currently in place in Ontario. There is no corresponding right to hunt by non-Aboriginal people but rather those individuals have a privilege to hunt in accordance with licensing provisions. (My emphasis) The Métis' right to hunt is derived from their customs, traditions and practices. Hunting, including the hunting of moose, was and continues to be an integral part of their culture.¹⁶¹

After the Trial Court decided that the Métis right to hunt had been interfered with it asked whether the right has been justifiably infringed through the *Sparrow* test. The questions that *Sparrow* requires to be answered by a claimant are laid out by Vaillancourt Prov. Ct. J. at trial. "First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?"¹⁶² The Trial Court applied each of these principles to the issues presented in *Powley*. First, the Trial Court found that a disparity exists when distinguishing between status Indians' right to hunt and a similar right for the Métis under provincial legislation. Judge Vaillancourt held: "There is no evidence before this court to warrant this disparity as between the two Aboriginal groups."¹⁶³ The limitations were unreasonable.

The Trial Court also determined that the regulation imposed undue hardship on the Métis' right to hunt. It was held that the legislation interfered with Métis hunters and not with the rights of status Indians. The problems that Métis hunters faced under this scheme included shortened hunting seasons, limited number of moose tags, confiscation of moose without tags, and expenses that a person must incur if one is charged under the *Game and Fish Act*. Status Indians do not face any of these problems under the regulatory scheme.

¹⁶¹ *Powley* Ont. Prov. Ct., *supra* note 10 at para. 115.

¹⁶² *Sparrow*, *supra* note 9 at 182.

¹⁶³ *Powley* Ont. Prov. Ct., *supra* note 10 at para 119.

The Trial Court held that the Métis were denied their preferred means of hunting.¹⁶⁴ Métis cannot hunt without the fear of quasi-criminal sanctions for hunting without a license. In essence, the Métis

[a]re forced to skulk through the forests like criminals as opposed to hunters exercising their constitutional rights. It was apparent from the evidence that was called in this trial that many Métis hunters are reluctant to chance being charged and having their game and weapons seized by the Ministry of Natural Resources.¹⁶⁵

Furthermore, Judge Vaillancourt of the trial Court ruled that “[t]he regulations are not minimal”¹⁶⁶ interference with the right to hunt.

After arriving at the above conclusions, the Trial Court turned its focus to whether the regulatory scheme could be justified. The Crown maintained that the purpose of the legislation was conservation. This argument has been used in previous cases to justify governmental interference with Aboriginal fishing rights of First Nations.

The problem that arises in assessing the legislation in light of its objective and the responsibility of the Crown is that the pursuit of conservation in a heavily used modern fishery inevitably blurs with the efficient allocation and management of this scarce and valued resource. The nature of the constitutional protection afforded by s.35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource. There is a clear need for guidelines that will resolve the allocational problems that arise regarding the fisheries.¹⁶⁷

Judge Vaillancourt maintained that there was no valid justification for excluding Métis from the allocation of resources when protections were being afforded to status Indians.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.* at para 121.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Sparrow*, *supra* note 9 at 184. Also see *Jack v. The Queen*, [1979] 2 C.N.L.R. 25, [1980] 1 S.C.R. 294 at 41 [*Jack* cited to C.N.L.R.] where the Supreme Court held:

Conservation is a valid legislative concern. The appellants concede as much. Their concern is in the allocation of the resource after reasonable and necessary conservation measures have been recognized and given effect to. They do not claim the right to pursue the last living salmon until it is caught.

Furthermore, the Crown contended that limiting the resource is essential to supporting recreational hunting and non-recreational pursuits. The Supreme Court in *Adams* addressed a similar issue of sports fishing:

I have some difficulty in accepting, in the circumstances of this case, that the enhancement of sports fishing per se is a compelling and substantive objective for the purposes of s.35(1). While sports fishing is an important economic activity in some parts of the country, in this instance, there is no evidence that the sports fishing that this scheme sought to promote had a meaningful economic dimension to it. On its own, without that sort of evidence, the enhancement of sports fishing accords with neither of the purposes underlying the protection of Aboriginal rights, and cannot justify the infringement of those rights.¹⁶⁸

The Trial Court in *Powley* held that a commercial interest, that does not acknowledge or protect constitutionally entrenched rights, is not a justification for infringement.

Although the Superior Court acknowledged that there is a valid legislative objective for the *Game and Fish Act*, the justification test for the infringement of Métis rights was not met.¹⁶⁹ On appeal, the Crown submitted that the Trial Judge erred in finding that the *Game and Fish Act* infringed on Aboriginal Métis hunting rights. The justification test from *Sparrow* was used again.¹⁷⁰ Justification includes the duty of consultation with Aboriginal peoples regarding their rights and the actions of the government.¹⁷¹ O’Neil J., in the Superior Court of Justice, acknowledged that the Métis people had not been consulted¹⁷² and that the government of Ontario does not recognize Métis rights to resources.¹⁷³

In the Ontario Court of Appeal the Crown argued that the purpose of the *Game and Fish Act* was conservation. It was agreed by the parties that if a right was established the onus of justification shifts to the government to prove that the infringement was legal.

¹⁶⁸ *Adams*, *supra* note 18 at 23.

¹⁶⁹ See *Powley Ont. Sup Ct.*, *supra* note 20 at para. 72.

¹⁷⁰ See *Sparrow*, *supra* note 9.

¹⁷¹ See *ibid.*

¹⁷² *Powley Ont. Sup. Ct.*, *supra* note 20 at para. 68.

¹⁷³ See *Powley Ont. Prov. Ct.*, *supra* note 10 at para. 112.

The Crown relied on s. 3 of the *Game and Fish Act* for justification of its infringement, which states its purpose is “[t]o provide for the management, perpetuation and rehabilitation of the wildlife resources in Ontario, and to establish and maintain a maximum wildlife population consistent with all other proper uses of lands and waters.”¹⁷⁴ The appellant also provided evidence that the moose population was at a level that should encourage conservation. Sharpe J.A. rejected this argument and agreed with the Trial Judge that the justification required from *Sparrow* was not met by the appellant.¹⁷⁵ Sharpe J.A. agreed with the lower courts that no priority has been allocated to the Métis people. Also, any justification based on the protection of commercial outfitters or outdoor activities fails to comply with the principles established in Canadian jurisprudence regarding s. 35 rights.¹⁷⁶ Further, the treatment of First Nations’ rights and Métis rights was not equal. This disparity was held to be fatal to the claim of the government to be acting in a trust like relationship with the Aboriginal group.

On the other hand Sharpe J.A. accepted that a stay of the order was justified. He held that conservation must be given a high priority when dealing with scarce resources:

Sparrow and the cases that follow make clear that conservation of a scarce natural resource is of paramount concern. In the appropriate circumstances, conservation may trump the Aboriginal right. Indeed, the very existence of the Aboriginal right may depend upon conservation measures being taken. The demand for the scarce natural resource may exceed what nature can supply.¹⁷⁷

The impact that Aboriginal hunting rights or Métis rights might have on the natural resources must be investigated. Furthermore, the rights of the Métis must be reconciled

¹⁷⁴ *Game and Fish Act*, *supra* note 2 at s. 3.

¹⁷⁵ See *Sparrow*, *supra* note 9 at 184.

¹⁷⁶ See *Powley Ont. C.A.*, *supra* note 25 at para. 168. A secondary argument of equitable sharing was submitted by the appellant, but this argument was rejected because the hunt is for food to sustain themselves and not a commercial enterprise. The priority scheme outlined in *Jack*, *supra* note 167 cannot be satisfied by commercial arguments of equitable access to resources for commercial exploitation.

¹⁷⁷ *Powley Ont. C.A.*, *ibid.* at para. 173.

with the rights of other Aboriginal groups.¹⁷⁸ The stay of the proceedings allowed time for the Crown to engage in meaningful consultation with the Métis regarding their constitutionally protected rights. The twelve month period allowed Ontario to consider the environmental impacts of Métis hunting and the allocation of resources after the needs of the Métis are incorporated in the conservation formula. The Métis would also have to provide estimates of the number of hunters and game that would be hunted each year.

The Supreme Court held that the failure of the Ontario government to recognize Métis rights to hunt or access any natural resources and the enforcement of ss. 46 and 47 of the *Game and Fish Act* infringed on the rights of the Métis. “This lack of recognition, and the consequent application of the challenged provisions to the Powleys, infringe their Aboriginal right to hunt for food as a continuation of the protected historical practices of the Sault Ste. Marie Métis community.”¹⁷⁹

The Crown’s conservation argument was rejected by the Trial Judge. Furthermore, the Supreme Court did not accept that the conservation argument was one that can be supported in this case. It acknowledged that the justification arguments of the appellant were primarily based on a species-specific approach. It was within the power of the Ontario government to limit Aboriginal rights to hunt based on conservation. “[B]ut Ontario’s blanket denial of any Métis right to hunt for food cannot be justified.”¹⁸⁰ It also held “[i]f the moose population in this part of Ontario were under threat, and there

¹⁷⁸ *Ibid.* at para. 174.

¹⁷⁹ *Powley S.C.C.*, *supra* note 1 at para. 47.

¹⁸⁰ *Ibid.* at para. 48.

was no evidence that it is, the Métis would still be entitled to a priority allocation to satisfy their subsistence needs in accordance with the criteria set out in *R. v. Sparrow*.¹⁸¹

The Supreme Court also rejected the Crown's argument that conservation can be justified based on the difficulty of identifying who is a Métis person:

[T]he Métis identity of a particular claimant should be determined on proof of self-identification, ancestral connection, and community acceptance. The development of a more systematic method of identifying Métis rights-holders for the purpose of enforcing hunting regulations is an urgent priority. That said, the difficulty of identifying members of the Métis community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada.¹⁸²

The question posed to the Supreme Court of Canada was “[W]hether ss. 46 and 47(1) of the *Game and Fish Act*, which prohibit hunting moose without a licence, unconstitutionally infringe the respondents’ Aboriginal right to hunt for food, as recognized in s. 35(1) of the Constitution Act, 1982.”¹⁸³ The Supreme Court held that the term Métis does not encompass all people of mixed Indian and European blood. Rather,

[i]t refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears. Métis communities evolved and flourished prior to the entrenchment of European control, when the influence of European settlers and political institutions became pre-eminent.¹⁸⁴

Significantly, the court referred to Métis as ‘peoples’ and that there is a diversity of culture, traditions and practices that exist in differing forms in varying Métis communities throughout Canada.¹⁸⁵

The Supreme Court defined a Métis community “[a]s a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a

¹⁸¹ *Powley S.C.C.*, *supra* note 1 at para. 48.

¹⁸² *Ibid.* at para. 49.

¹⁸³ *Powley S.C.C.*, *supra* note 1 at para. 8.

¹⁸⁴ *Ibid.* at para. 10. The court also relied on reference to the *Report of the Royal Commission on Aboriginal Peoples* *supra* note 29 at 199-200 and 202.

¹⁸⁵ *Powley S.C.C.*, *supra* note 1 at para. 11.

common way of life.”¹⁸⁶ The purpose of this identification was to determine whether a claimant can establish that s/he is from an historic community to assert constitutional protection of traditional practices. This was necessary to elaborate on the purpose of s. 35. “The purpose and the promise of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture.”¹⁸⁷ The hunt for rights was successful in *Powley*, but the game of protection of those rights continues.

2.2 Application of the *Powley* test in other contexts.

Two subsequent cases, *R. v. Willison*¹⁸⁸ and *R. v. Laviolette*,¹⁸⁹ have applied the *Powley* test to determine whether Métis claims to hunting are protected by the Constitution. *Willison* considered a Métis hunting case in British Columbia. The province of British Columbia denied that Métis have a similar right to hunt as Indians. The *Laviolette* case dealt with a Métis hunter that was charged for fishing out of season at Green Lake, Saskatchewan. In both of these cases problems of identifying historic Métis communities, traditional rights (hunting, fishing etc.), and membership in a specific community were addressed. In these cases it can be seen that negotiation was not the preferred means of recognizing Métis hunting rights by the provinces of British Columbia and Saskatchewan.

¹⁸⁶ *Ibid.* at para. 12.

¹⁸⁷ *Ibid.* at para. 13.

¹⁸⁸ *R. v. Willison*, [2005] B.C.J. No. 924, 2005 BCPC 131 [*Willison*].

¹⁸⁹ *R. v. Laviolette*, [2005] S.J. No. 454, 2005 SKPC 70 [*Laviolette*].

CHAPTER 3

FISHING FOR MÉTIS RIGHTS IN SASKATCHEWAN AND B.C.

3.0 British Columbia Métis Rights.

*R. v. Willison*¹

Although, *Powley* can be seen as a victory for the Métis in the Sault Ste. Marie area, Métis rights are still largely unrecognized by provincial conservation schemes. Since the legal system in Canada embraces a case-by-case approach² to Métis and First Nations' constitutional defences for hunting rights, the Métis located in British Columbia had to seek protection from the courts for their rights. The *Willison* case asked the Provincial Court to determine the applicability of s. 35(1) of the *Constitution Act, 1982* to a Métis claim of hunting rights in British Columbia. Specifically, the *Willison* case heard in the Provincial Court of British Columbia was asked whether the licencing requirements in British Columbia unconstitutionally infringed Métis hunting rights under s. 35 of the *Constitution Act, 1982*.

3.0.1 Facts of *Willison*

On November 26, 2000 Gregory Kenneth Harold Willison shot and killed a mule deer near Falkland, B.C. Mr. Willison had no hunting license at the time that he shot the mule deer. Mr. Willison was subsequently stopped by conservation Officer McHarg. Mr. Willison informed McHarg that he had a mule deer in the back of his truck. When Mr. Willison was asked to produce a hunting license for the deer, he gave the officer his

¹ See *R. v. Willison*, [2005] B.C.J. No. 924, 2005 BCPC 131. at para. 2. [*Willison*]. *Willison* is currently being appealed by the B.C. Crown. Oral arguments on appeal to the British Columbia Supreme Court were heard in December 2005.

² See *R. v. Powley*, [2003] 2 S.C.R. 207, [2003] 4 C.N.L.R. 321 [S.C.C.] [*Powley* cited to C.N.L.R.].

Métis Nation of British Columbia card and a copy of *R. v. Howse*³ instead. Mr. Willison stated that *Howse* recognized the right of Métis to hunt for food. The deer was seized by McHarg and Mr. Willison was charged under the sections 26(1) c), 33(2), and 5(1) of the *B.C. Wildlife Act*.⁴

The *actus reus* of the offence was admitted by Mr. Willison, however, as a Métis person he contended that s. 35(1) of the *Constitution Act, 1982* provides constitutional protection from the provincial legislation. Further, Mr. Willison sought a constitutional remedy under 24(1) of the *Charter of Rights and Freedoms*. Judge Stanfield, for the B.C. Provincial Court, agreed with this approach and suggested that the procedure the trial should follow was set out in *R. v. John*.⁵

The British Columbia Provincial Court set out the two stages that the trial should follow:

According to the John procedure I must first consider whether it has been proved that the substantive offence(s) is/are made out, subject to any aboriginal rights. In this case, by operation of the agreed statement of fact, by Mr. Willison's general admission of the essential elements of the offence, and generally with the agreement of counsel, I make that finding. Thus, the first stage of the trial is completed.⁶

The second stage of the trial considered “[w]hether the defence can discharge its burden of proof of an aboriginal right under s.35 of the Charter and, in the event that right is proved, whether there has been any infringement of that right.”⁷ Only once Mr. Willison

³ *R. v. Howse*, [2000] 3 C.N.L.R. 228, [2000] B.C.J. No. 905. At the time of the alleged offence the *Howse* decision upheld the Métis right to hunt for sustenance. This case was subsequently overturned by the British Columbia Court of Appeal. See *R. v. Howse*, [2003] B.C.J. No. 508, [2003] BCCA 152.

⁴ *Wildlife Act*, R.S.B.C. 1996, c. 488, ss. 26(1) c) and 33(2). B.C. Regulation 8/99 enacted pursuant to the provisions of the *Wildlife Act* R.S.B.C. c. 488, s. 5(1).

⁵ *R. v. John* (unreported) Campbell River Registry #21389, October 15, 1996, and August 19, 1997, as approved by the Honourable Mr. Justice Lander in a Supreme Court judicial review of those directions, (unreported) Campbell River Registry, #21389, November 12, 1997.

⁶ *Willison*, *supra* note 1 at para. 11.

⁷ *Ibid.* at para. 12.

proved an infringement of an Aboriginal right would the court determine “[w]hether such infringement was reasonable and demonstrably justified under s.1 of the Charter.”⁸

It should be noted that the approach of the B.C. Provincial Court is not a correct approach to address Aboriginal rights according to Lamer C.J.C. in *Van der Peet*.⁹ Specifically, s. 35 of the *Constitution Act, 1982* is not located in the *Charter of Rights and Freedoms*¹⁰ - it is outside the *Charter*. Secondly, remedies under s. 24(1)¹¹ only apply to *Charter* cases.¹² Aboriginal and treaty rights cases are under the realm of constitutional law. Thirdly, by its own terms, s.1¹³ only applies to *Charter* cases.¹⁴ Indeed, there is a provision that provides protection for Aboriginal rights in s. 25 of the *Charter*,¹⁵ but it is a clause that does not allow non-Aboriginal people to use the *Charter* against Aboriginal or treaty rights:

⁸ *Ibid.* at para. 13.

⁹ See *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177, [1996] 2 S.C.R. 507 *supra* note 49 at para. 19 where Lamer C.J.C. states [*Van der Peet* cited to S.C.R.]:

Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the Charter, aboriginal rights must be viewed differently from Charter rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal.

¹⁰ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

¹¹ *Ibid.*, s. 24(1): “Anyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”

See Thomas Isaac, “Symposium: 20 Years Under the Charter: Canadian Charter of Rights and Freedoms: The Challenge of the Individual and Collective Rights of Aboriginal People” (2002) 21 Windsor Y.B. Access Just. 431 at 439 [*The Challenge of Individual and Collective Rights*] where Isaac states: “Subsection 24(1) of the *Charter* appears to have no effect on section 25 since section 25 clearly does not guarantee any *Charter* rights, as contemplated by subsection 24(1) of the *Charter*.”

¹² See Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1999) at 790 where Hogg discusses the limits of the applicability of s. 24(1) of the *Charter*.

¹³ *Charter*, *supra* note 10 s. 1. “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subjected only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

¹⁴ See Dwight Newman, “The Limitation of Rights: A Comparative Evolution and Ideology of the Oakes and Sparrow Tests” (1999) 62 Sask. L. Rev. 543 at 548 where Newman states: “Aboriginal rights under s. 35 are outside the *Charter* and not subject to s. 1.”

¹⁵ *Charter*, *supra* note 10 at s. 25:

Section 25 is the “shield” that will protect the rights of aboriginal people from encroachment by the *Charter*. Caution, however, must be exercised in treaty negotiations and the judicial interpretation of section 25, so as not to allow the individual rights and freedoms of aboriginal people to become overshadowed by their collective rights.¹⁶

Using the *Charter* in addressing Aboriginal and treaty rights is not an approach that has been embraced by the judicial system in Canada.

The Crown admitted that Mr. Willison is a Métis person and identified as a Métis his whole life.¹⁷ It was also admitted by the Crown that Mr. Willison has ancestral ties to the Okanagan area. Mr. Willison is a member of the Salmon Arm Métis Local and the Métis Provincial Council of British Columbia. It was not conceded by the Crown that the political entities constitute a contemporary Métis community.¹⁸ It was further admitted by the Crown that hunting is of central significance to Métis culture.

The B.C. Court set out the issues to decide in *Willison*:

1. What is the definition of community in the context of Métis hunting rights?
2. Did an historic Métis community exist at the time of assertion of effective control by Europeans.
3. If there a Métis right to hunt in the Okanagan area of B.C., are there geographical limitations on the area that Métis can hunt.
4. Whether there is a contemporary Métis community in the Okanagan area.
5. Is there continuity between an historic Métis community and a contemporary community (if one is found to exist)?

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

See also *The Challenge of Individual and Collective Rights*, *supra* note 11 at 436 where Isaac states:

Section 25 uses the words ‘abrogate’ and ‘derogate.’ ‘Abrogate’ is defined as a verb, meaning to repeal or abolish. “Derogate” is defined as a verb, meaning to take away from or detract from. Thus, *Charter* rights and freedoms cannot be construed so as to abolish or detract from aboriginal, treaty or the other rights and freedoms of aboriginal people.

¹⁶ *Ibid.* at 432. See also 436 where Isaac states:

The *Charter* is Part I of the *CA 1982*. Part II of the *CA 1982* deals with the rights of aboriginal people. Important to note is that Part II is outside the *Charter* and is, therefore, not subject to its provisions. Section 25 comes under the *Charter* sub-heading of “General” which also includes a number of other interpretive provisions including those relating to multicultural heritage (section 27), the equal guarantee of *Charter* rights to male and female persons (section 28), and denominational school rights (section 29).

¹⁷ See *Willison*, *supra* note 1 at para. 14.

¹⁸ See *ibid.*

6. Is Mr. Willison a member of an historic rights bearing Métis community that permits him to hunt in a geographically relevant area?¹⁹

The *Powley* test was utilized to determine answers to these questions.

Mr. Willison's argument was that he was hunting deer for sustenance. As mentioned earlier sustenance hunting was of central significance to historic Métis communities. The right to hunt is not species specific, but is limited to a geographical area which is relevant to the historic Métis community.²⁰ The historic practices of the Métis of the Okanagan area were tied to the land and hunting for food.

The B.C. Provincial Court, through the expert testimony of Dr. Michael Angel, determined that the first Métis people in the Okanagan area were generally from Rupert's Land and "[w]ere either Cree Métis or Ojibway Métis and were similar to the Métis group that was in Red River. The people running the Brigade system were, to a large extent, either French or French Métis. The French Canadian Métis, Iroquois Métis, mainly came out as boatmen."²¹

¹⁹ See *ibid.* at para. 17 for a list of the issues the court sets out to decide.

²⁰ See *ibid.* at para. 43. See also *Powley*, *supra* note 2 at para. 19. See also *Willison*, *supra* note 1 at para. 65 where the Provincial Court held that the geographical area that the Métis frequented is specific a area and "[s]hould be understood to include the environs of the Brigade Trail commencing in Fort Kamloops, moving south through the Falkland area itself and then the Okanagan Valley, and continuing south to what is today the US border en route to Fort Okanagan."

²¹ *Willison*, *supra* note 1 at para. 54. See also para. 58 where the Provincial Court refers to the situation of the Métis that arose from them being in British Columbia:

Dr. Angel described the early Métis community in the Pacific Northwest as a very fluke situation where some of the people who came out here were Métis already because of their connections with Red River. Some of the people who came out here were French or Scots or whatever, married local women here and, in effect, began a new group of Métis... some of the people were Iroquois who were Métis... (and) also married local women here.... [s]o all these groups start out as different strands of Métis but they all come together because they inter marry amongst themselves. See also where the B.C. Provincial Court refers to expert testimony given by Ronald Nunn at para. 62: Mr. Nunn says the Métis generally migrated into British Columbia with the fur trade, coming from east to west. He says that as early as 1776 or 1777 a Métis man John Cofinnley and his family wintered in what is now the Kootenay area, and blazed a trail for David Thompson. Mr. Nunn says there was a practice of B.C. Métis journeying back and forth to Red River (June 21 trans. at 113-115).

Again, it can be seen that another ethnogenesis of Métis peoples occurred when Métis relocated to the British Columbia area. Even though the Métis relocated to British Columbia the traditions that they followed in Red River and other Métis communities were still followed, such as the election of the Captain of the hunt.²² The evidence given at trial supported the position that the traditions of the Métis are still practiced today regarding hunting:

Mr. Nunn said the Métis still elect captains, and still have organized hunts; he says the knowledge and skills underlying the selection of the captain in 1837 are just as applicable today and necessary. He says the practices of sustenance hunting to the best of his knowledge have not changed.²³

There were substantial links to the Métis in Red River, but at the same time the Métis in the Okanagan had to adapt to the environment that they lived in and created a new category of Métis people living in a traditional way.

The B.C. Provincial Court addressed the issue of whether there was an identifiable Métis community in the Okanagan prior to the assertion of effective control by Europeans. The Provincial Court decided that an ethnic community would be a good relative comparison:

In my view our current understanding of what constitutes an ethnic ‘community’ is an appropriate reference point having regard to the Supreme Court’s assertion that ‘the purpose and promise of Section 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of the Métis culture.’²⁴

²² See *ibid.* at para. 69 where:

Mr. Nunn says the Métis established a hierarchy within their hunting practices designating a captain of the hunt elected by popular vote and chosen for knowledge and skill. Such organized hunts also included an infrastructure of support for getting to the hunting location, skinning, processing animals and so on....The purpose of the hunt was to gain sustenance for the people working in the forts, the other employees of the Hudson’s Bay, and for the boatmen on the Columbia, and for Métis families to feed; all these people depended on wild game for sustenance.

²³ *Ibid.* at para. 71.

²⁴ *Ibid.* at para. 79.

The presence of the Métis was a pivotal part of the development of the economic partnerships between Aboriginal and non-Aboriginal people.²⁵ The B.C. Provincial Court held that there was an historic rights bearing Métis community in the Okanagan-Brigade Trail area of B.C. that can be equated with the one that existed in Sault Ste. Marie, Ontario. where Steve and Roddy Powley were from.

The actions of the Dominion Government against the Métis at Red River forced the Métis to relocate in areas all across the western regions of what is now Canada.²⁶ As a result of this dispersal, new Métis communities arose and these communities exist today. Evidence given at trial supported the position that Métis people identify with one another at social gatherings such as potlucks and the communal hunt. In accepting that there is a contemporary Métis community the B.C. Provincial Court held that it was not necessary that all members of that community show direct ancestral ties to the historic B.C. Métis community.²⁷ The requirements of *Powley*, that there be an ancestral connection, places an internal limit as to how many people are able to claim the right to hunt as a Métis person in that area. There are a limited number of people that can show that their ancestral ties are linked to those of the historic community. Mr. Willison,

²⁵ *Ibid.* at para. 85.

I am satisfied on Dr. Angel's evidence that for 40 or 50 years, in connection with the British Columbia fur trade, which was a pivotal component of the evolution of British Columbia from First Nations communities exclusively to what we are calling "European control", the Métis were in fact "indispensable" members of the British Columbia aboriginal/non-aboriginal economic partnerships. It may fairly be said that they 'contributed massively' to European penetration of British Columbia.

²⁶ See *ibid.* at para. 89 where the B.C. Provincial Court referred to the testimony of Mr. Willison: [O]ur people were dispersed (post-European control) from ... our homeland.... [A]fter the first 1870 Riel issue, the Métis people moved in mass migrations all over, back and forth and all around west central North America and, in fact, many went up into the Northwest Territories. We were dispersed from our land.

²⁷ See *ibid.* at para. 113 where the B.C. Provincial Court judge stated: "I do not believe it be necessary to establish that every member of the local Métis community can demonstrate a personal ancestral connection to the particular Métis persons who formed the British Columbia ancestral community."

however, was found to be a member of a contemporary rights bearing community with ancestral ties to the historic Métis community.²⁸

In *Willison* the Crown conceded that hunting was an integral part of the Métis culture. The defence provided substantial evidence to show that Mr. Willison's relatives were hunters and traders. Mr. Willison referred to his predecessors as hunters since time immemorial.²⁹ Regardless of the Crown concession, the evidence showed that there is a tradition of hunting in the Willison family.

In 1846 the border between Canada and the United States was established. This border cut through the Brigade Trail, which was part of the Métis trading route. This left the Métis in an isolated situation with fewer links among their communities. The European settlers that came to the Okanagan area often took Aboriginal wives. Around 1860-1870 the Métis were being ignored by the immigrant Europeans and viewed the Métis as people that needed to go back to First Nations society.³⁰

Although, some historians believed that the Métis had simply disappeared from British Columbia around the 1860s,³¹ the Métis community was still present in the Okanagan area. Evidence suggested that there were actually more Métis than white farmers in the area during that time period. The Provincial Court Judge held that Métis culture continued to exist in light of racism that forced it to go underground. The customs that were carried out by the Métis were the same customs that were passed on to successive generations of their families. Therefore, the continuity of customs and

²⁸ See *ibid.*

²⁹ See *ibid.*, at para. 124.

³⁰ See *ibid.* at para. 126.

³¹ See *ibid.* at para. 127.

traditions were carried on regardless of the racism that the Métis faced in the Okanagan area.

In *Powley* the Supreme Court of Canada held that “[t]he doctrine of extinguishment applies equally to Métis and to First Nations claims.”³² As with *Powley*, there was no evidence presented to support a position that the Métis right to hunt had been extinguished. The B.C. government did not recognize any Métis right to hunt or to harvest resources. The evidence showed that there was a Métis right to hunt and the B.C. government had not made the legal allowances to recognize the Métis constitutional right to hunt. The B.C. Provincial Court held “[t]his lack of statutory or regulatory or equivalent recognition, and the consequent application to Mr. Willison of the provincial hunting licencing legislation at issue in this proceeding, infringes his aboriginal right.”³³

The B.C. Provincial Court also held that Mr. Willison made his case by proving the required factors to meet to *Powley* test. Mr. Willison established that there was an historic Métis community that existed at the time of the assertion of European control. It was also proven that there was a contemporary Métis community that met the continuity requirement of the requirements from *Powley*. Mr. Willison had ancestral connections to the historic rights bearing community and was accepted as a member of the contemporary Métis community. The discussion confirms that the right to hunt exists for the Métis in the Okanagan region, but limits the right to the traditional area that was used by the historic community. The B.C. Crown is appealing the decision of the Provincial Court.

³² *Powley*, *supra* note 2 at para. 47.

³³ *Willison*, *supra* note 1 at para. 133.

3.1 Saskatchewan Métis Rights.

Facts of *R. v. Laviolette*

Ron Laviolette, a Métis person, was ice fishing on April 6, 2001 at Green Lake, Saskatchewan during closed season. Mr. Laviolette was fishing with two other men who were treaty Indians and have the right to fish for food out of season. Another man fishing on Green Lake was a Métis and not charged as he was born and raised in Green Lake. Green Lake Métis can hunt at anytime of the year. The provincial regulations that govern the Department of the Environment make certain allowances for Aboriginal rights to hunt and fish if certain criteria are met.

Mr. Laviolette lived on the Flying Dust First Nation near Meadow Lake and had a Métis membership card from the Meadow Lake Métis Local. He did not fit the exemption criteria and was charged “[f]or unlawfully angling during a closed time contrary to section 13(1) of The Fisheries Regulations made pursuant to *The Fisheries Act* (Saskatchewan), 1994.”³⁴ Mr. Laviolette self-identified as a Métis person and produced his Meadow Lake Local 31 Métis card when he was approached by a Conservation Officer. Mr. Laviolette had two fish in his possession that he had caught that morning.

Métis were permitted to fish if they met the following criteria: “[t]hey must identify themselves as Métis; (b) they must live within the Northern Administration District; (c) they must have a long-standing connection to the community; (d) they must live a traditional lifestyle.”³⁵ Meadow Lake is not within the Northern Administrative District where an exemption exists for Métis hunters. Subsequently, Conservation

³⁴ *R. v. Laviolette*, [2005] S.J. No. 454, 2005 SKPC 70 at para. 1.

³⁵ *Ibid.* at para. 13.

Officer charged Mr. Laviolette for violating s. 13(1) of *The Fisheries Act (Saskatchewan)*.³⁶

The *Powley* test³⁷ was applied to *Laviolette* to determine whether the accused had a Métis Aboriginal right to fish for food that was protected by s. 35 of the *Constitution Act, 1982*. The following part of this analysis will look at how the Supreme Court test was applied to a Métis person in Northern Saskatchewan. The classification of the right at issue was a right to fish for food.

Crown counsel contended that community should be defined in a general context. The Crown argued that the common understanding of the ‘community’ would include “[v]illages, towns or cities and their surrounding areas.”³⁸ The Saskatchewan Provincial Court held that there are established guidelines when looking at community in the context of the Métis:

- a) a Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life;
- b) in determining whether particular claimants comprise a Métis community, it is not necessary to decide whether that community forms part of a larger Métis people that extends over a wider area.³⁹

³⁶ S. 13(1) of the *Fisheries Regulations*, 1995, Ch. F-16.1, Reg. 1, enacted pursuant to *The Fisheries Act (Saskatchewan)*, 1994, Ch. F-16.1: “13(1) No person shall angle in a zone or in any Saskatchewan waters during the closed times as designated by the minister or varied by the director pursuant to section 14.”

³⁷ *Ibid.* at para. 16. The 12 point test laid out by *Powley* was followed by Kalenith, Prov. Ct. J. in the Saskatchewan Provincial Court:

- a) what is the right in issue?; b) what is the meaning of the word “community” in the context of Métis Aboriginal Rights?; c) at the time of effective control, was there an historic Métis community either in the area where Mr. Laviolette was fishing, or in some wider area I find to be relevant for these purposes?; d) does any right to fish in the relevant area have geographical limitations and, if so, what are those limitations?; e) does a Métis “community” exist in the relevant area today?; f) what is the relevant time frame (the date of European effective control)?; g) was fishing for food integral to Métis life in the relevant area?; h) has there been sufficient continuity from the date of European effective control until today between any historic community and any community which I find exists today?; i) is Mr. Laviolette a rights-bearing member of any such community?; j) was the right extinguished?; k) was there an infringement of the right?; l) was the infringement justified?

³⁸ *Laviolette*, *supra* note 34 at para. 18.

³⁹ *Ibid.* at para. 18. See also at para. 18 where Kalenith, Prov. Ct. J. elaborated on the meaning of community because it can included more than a single town or village:

- a) in *Powley*, the trial judge held, [1999] 1 C.N.L.R. 153 at 171, that the concept of a Métis community should not be limited to Sault Ste. Marie proper but that it should include the

The Crown conceded that there is an historic rights bearing community in Green Lake. What was at issue, however, was whether Meadow Lake was included in the larger community. In making the determination that Meadow Lake is part of the larger Métis community, the Saskatchewan Provincial Court relied on the expert testimony of Dr. Frank Tough and John Thornton.

Dr. Tough testified that limiting the Métis to single villages or towns would be problematic based on the hunting and gathering lifestyle that they lived.⁴⁰ Saskatchewan Provincial Court accepted that “[t]he Métis had a regional consciousness and that they were highly mobile.”⁴¹ This fact is important because the availability of game and fish varied in different places at times during the season. The Saskatchewan Provincial Court also accepted that “[r]egional unity was a highly established network based on trade and family connections. While the importance of a particular settlement fluctuated at different times, certain settlements remain fixed.”⁴² The fixed settlements played a key role in the interactions of the Métis from community to community.⁴³

surrounding environs (seven communities and areas, some as far away as 100 kilometers and extending into Northern Michigan);

- b) in *R. v. Willison*, [2005] B.C.J. No. 924, 2005 BCPC 131 (B.C. Prov. Ct.), the Trial Judge held that Métis hunting in the immediate vicinity of Falkland could only be understood could only be understood [*sic*] contextually in its relation to the Brigade Trail of the fur trade. He held that a defining characteristic of the Métis in British Columbia prior to ‘control’ was their close association to the fur trade and the nomadic lifestyle it required. He accepted evidence that while some Métis were employed and stayed at Hudson’s Bay Company posts, most of them were relatively constantly on the move and had a nomadic lifestyle. He concluded that the ‘environs’ of Falkland for the purpose of understanding Métis life in B.C. prior to control, but specifically in relation to Falkland, B.C., should be understood to include the environs of the Brigade Trail commencing at Fort Kamloops moving south through the Falkland area itself and then the Okanagan Valley, and continuing south to what is today the U.S. border en route to Fort Okanagan (a total distance of at least 300 kilometers).

⁴⁰ See Testimony of Dr. Frank Tough, Examination-In-Chief, Trial Transcripts, Vol. IV online: The Native Law Centre <<http://www.usask.ca/nativelaw/factums/view.php?id=441>> at 1273 (as of November 8, 2005) [Tough]. See also *Laviolette*, *supra* note 1 at para. 21 where Kalenith, Prov. Ct. J. summarized some of the testimony of Dr. Tough.

⁴¹ *Laviolette*, *supra* note 34 at para. 21.

⁴² *Ibid.* at para. 23. See also at para. 24 where Kalenith Prov. Ct. J. comments on the fixed Métis settlements:

It was held by the Saskatchewan Provincial Court that Meadow Lake is an historic Métis settlement, which was first established by Cyprien Morin, a Métis from Green Lake.⁴⁴ The Provincial Court also held that there are substantial continual ancestral connections between Green Lake and Meadow Lake.⁴⁵ These interconnections also led to a sharing of a common way of life, practices, customs and traditions. Provincial Court Judge Kalenith held that there was a triangle of regional attachment of Métis communities in Northern Saskatchewan:

I find that the evidence led at this trial contains sufficient demographic information, proof of shared customs, traditions and collective identity to support the existence of a regional historic rights-bearing Metis community, which regional community is generally defined as the triangle of the fixed communities of Green Lake, Ile a la Crosse and Lac la Biche and includes all of the settlements within and around the triangle including Meadow Lake.⁴⁶

The Crown conceded that there was a contemporary Métis community at Green Lake and that Mr. Laviolette has an ancestral connection to the historic Métis community at Green Lake.⁴⁷ Although, Mr. Laviolette's parents moved back and forth from Green Lake, they always lived within the larger Métis community that was frequented by kin relationships and trading routes. Mr. Laviolette moved in and out of Green Lake and

The fixed settlements were connected by a transportation system of river routes, cart trails and portages. Constant movement between the fixed settlements allowed the Métis in the area to develop and maintain significant trade and kinship connections throughout the region and with the larger network of Métis people.

⁴³ See *ibid.* at para. 25 where Kalenith Prov. Ct. J. commented on the regional connectedness of the Métis settlements:

The evidence showed a regional network of relationships in the triangle created in and around the fixed settlements of Lac la Biche, Ile a la Crosse and Green Lake. It also showed that there were strong kinship ties between these three fixed settlements and that the Métis intermarried and moved between these settlements over time. In addition to the fixed settlements, there were many other settlements within and around the three fixed settlements and along the transportation routes that connected them together. The transportation corridor, with its southeasterly hub at Green Lake, was important because it was the access route into the Mackenzie District, a storehouse of plenty and rich in furs.

See also Testimony of John Thornton, Examination-In-Chief, Trial Transcripts, Vol. V, online: The Native Law Centre <<http://www.usask.ca/nativelaw/factums/view.php?id=441>> at 982-985 (as of August 11, 2005).

⁴⁴ *Laviolette*, *supra* note 34 at para. 27. See also Tough, *supra* note 40 at 1412 -1413, 1425 and 1435.

⁴⁵ See *Laviolette*, *ibid.* See also Tough, *ibid.* at 1413-1425.

⁴⁶ *Laviolette*, *supra* note 34 at para. 28.

⁴⁷ *Ibid.* at para. 30.

currently lives on the Flying Dust reserve, which is within the larger community of social interaction. For most of his life he has lived in the Métis community.

Provincial Court Judge Kalenith stated what was included in the larger Métis community.

[s]ignificant Metis populations continue to exist at Green Lake and Meadow Lake and other settlements within the “community”, and that extensive kinship connections exist between Ile a la Crosse, Buffalo Narrows, Beauval, Jackfish Lake, Jans Bay, Pinehouse, Patuanak, Turnor Lake, Victoire, St. George’s Hill, Michel Village, Duck Lake, La Loche, Keeley Lake, Canoe Lake, Smooth Stone, Kikino (Alberta), Dore Lake, Lac La Biche (Alberta), and Red River Settlement (Manitoba).⁴⁸

He accepted that the Métis continue to exist in communities throughout Northern Saskatchewan, and concluded that “I find that the contemporary rights-bearing community is best described as the Métis community that now lives and uses Northwestern Saskatchewan and includes the settlements of Green Lake and Meadow Lake.”⁴⁹ Mr. Laviolette was found to be a resident of the Métis community and the precise place of his residence does not matter as long as it is within the boundaries of the historic area of the Métis.

The Crown conceded that the Métis community existed by 1870 at Green Lake. It was submitted by the Crown that the date of effective control was 1870, the date that Rupert’s Land became part of Canada.⁵⁰ The Court accepted the argument put forward by Mr. Laviolette that “[c]ontrol takes place when the Crown’s activity has the effect of changing the traditional lifestyle and the economy of the Métis in a given area.”⁵¹ The evidence given by the historical experts suggested that no change to Métis lifestyle had

⁴⁸ *Ibid.* at para. 34.

⁴⁹ *Ibid.* at para. 35. The Court held that Mr. Laviolette was not a member of Green Lake proper as he did not meet the criteria of community acceptance as most of the people that testified did not personally know of Mr. Laviolette.

⁵⁰ See *ibid.* at para. 36.

⁵¹ *Ibid.* at para. 37.

occurred in 1903 even with the granting of forestry licenses.⁵² No real change to Métis lifestyle had occurred until 1912:

I find that no real change in lifestyle in the area took place until 1912 when the Department of the Interior established townships and set aside two on either side of Green Lake. At this time the Metis also registered their land claims under the new land system. Accordingly, I find the date of effective control to be 1912.⁵³

The Crown conceded that fishing was integral to the distinct culture of the historic Métis community in Northern Saskatchewan up to and after 1870. The fishery was important to the Métis for both sustenance and for survival. In consideration of the Métis fishery, the Saskatchewan Provincial Court held that the evidence “[c]learly shows that fishing for food was an integral part of life in the area I have found to be the relevant ‘community’ generally and in Green Lake and Meadow Lake specifically at 1912, the date of effective control.”⁵⁴ The Crown accepted that fishing has been an important aspect to the Métis community since 1870 and that importance remains today. Fishing remains an integral practice in both Green Lake and Meadow Lake.⁵⁵

The Saskatchewan Provincial Court applied the test from *Powley* to determine if a person is Métis: “a) self-identify as Métis; b) have an ancestral connection to the relevant historic Métis community, and c) be accepted by the modern community.”⁵⁶ The Crown accepted that Mr. Laviolette self-identifies as a Métis person. Further, the Crown also acknowledged that Mr. Laviolette has ancestral ties to the historic settlement of Green Lake, which is part of the larger Métis community.⁵⁷

⁵² See *ibid.* at para. 38 where Kalenith, Prov. Ct. J. commented on the development that had occurred at Green Lake in 1903: “The experts gave evidence that no development or settlement by non-aboriginal peoples began in the region until at least 1903 when forestry leases were granted in an area near Green Lake. Even then, there is no evidence of changes to Métis life in the region.”

⁵³ *Ibid.* at para. 39.

⁵⁴ *Ibid.* at para. 41.

⁵⁵ See *ibid.* at para. 43.

⁵⁶ *Ibid.* at para. 44.

⁵⁷ See *ibid.* at para. 46.

The Crown did not, however, accept that Mr. Laviolette was a member of the contemporary community at Green Lake. The Crown put forward the following arguments:

a) Mr. Laviolette is not a member of the Métis local at Green Lake but is a member of the Métis local at Meadow Lake; (b) He does not reside at Green Lake and never has; (c) He did not assert that he is a member of the Métis community at Green Lake but instead described himself as a member of the First Nations community on the Flying Dust Indian Reserve; (d) He is not known or is only vaguely known by many of the people from Green Lake who testified at trial; (e) There was no evidence that he participated in any Métis cultural events either at Green Lake or otherwise except for hunting and fishing.⁵⁸

The Provincial Court rejected the argument that Mr. Laviolette was not a member of the Métis community. The Crown attempted to limit the definition of community to that of Green Lake proper. The Provincial Court held that the community was not limited to Green Lake. Mr. Laviolette was a member of the larger Métis community. Although he did not spend his whole life at Green Lake, he spent summers harvesting fish with his Grandparents and learning the ways of the community, culture and traditions. The Provincial Court held that Mr. Laviolette was not a member of the Green Lake community as he was not known by many people in the town.⁵⁹

Mr. Laviolette held a membership at the Meadow Lake Métis Local and not the local located at Green Lake. Membership in a political organization is not determinative of who is a member of a Métis community.⁶⁰ His membership in the Meadow Lake Local, which is part of the larger Métis community, showed that he was a member of the contemporary Métis community, which is Northern Saskatchewan.⁶¹

The Crown argued that hunting and fishing alone were not sufficient to show that Mr. Laviolette takes part in traditional practices of the Métis community. Provincial

⁵⁸ *Ibid.* at para. 47.

⁵⁹ See *ibid.* at para. 49.

⁶⁰ See *ibid.*

⁶¹ See *ibid.* at para. 51.

Court Judge Kalenith ruled that it is not necessary that Mr. Laviolette participate in jigging or fiddling in order to have learned part of the traditional activities of the Métis community.⁶² The Provincial Court Judge summarized his position as follows: “I am satisfied that Mr. Laviolette’s involvement in hunting and fishing for food show his involvement in Métis cultural activities sufficient to meet the test in *Powley*.”⁶³

The Crown conceded that there has been no extinguishment of the constitutional rights of the Métis in Northern Saskatchewan.⁶⁴ The Crown further acknowledged that if a right did exist that it had been unjustifiably infringed by government action.⁶⁵ No evidence was produced to support a position that could justify the infringement of Métis rights.⁶⁶ It was concluded by the Saskatchewan Provincial Court that Mr. Laviolette is a member of the Meadow Lake Métis community that is included in the larger Métis community of Northwest Saskatchewan. Consequently, the Métis community in Northern Saskatchewan has a traditional right to hunt and fish for food. This case was not appealed by the Crown in Saskatchewan.

⁶² See *ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.* at para. 52.

⁶⁵ *Ibid.* at para. 53.

⁶⁶ *Ibid.* at para. 54.

CHAPTER 4

EMPTYING THE TRAPS OF THE CANADIAN LEGAL CONSCIENCE

Indeed, section 35(1) is not just any law. It forms part of the constitution and, like the Charter of Rights and Freedoms, aims at providing greater security for vulnerable groups in Canadian society. Rules designed to operate as barricades against oppression should presumably be applied less flexibly and more consistently than other branches of our legal system, lest they fail in their purpose.¹

4.0 INTRODUCTION

With the patriation of the Constitution in 1982 the Canadian legal consciousness faced two important challenges. First, the *Charter of Rights and Freedoms* was implemented as a means to protect Canadian citizens from governmental action that would violate their fundamental rights. Second, the passing of s. 35 in the *Constitution Act, 1982*,² which recognized and affirmed existing Aboriginal and treaty rights, had the potential to bring about a fundamental shift in the way that governments, bureaucrats, courts and politicians addressed issues that affect Aboriginal peoples.

Ideally, the application of the Canadian common law would protect the historic rights of Aboriginal peoples by using s. 35 as a shield. Instead, over the past 23 years, the rights of Aboriginal peoples have been subjected to the politically self-centered application of the common law regarding Aboriginal and treaty rights. The self-centered

¹ Russel Lawrence Barsh and James Youngblood Henderson, "The Supreme Court's Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993 at 1006.

² *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

approach of forcing the common law on to Aboriginal peoples has led the Supreme Court of Canada to pick up where colonial oppression and destruction had left off. Any hope of using s. 35 alone to protect Aboriginal and treaty rights is quickly becoming a fleeting dream. The dreams of s. 35 have turned into a hidden dagger of deception that government and adjudicators utilize to justify the continuing Aboriginal nightmare of the destruction of their peoples, cultures and societies.

In dealing with constitutionally entrenched rights one should be safe to believe that these rights are part of the highest law of the land. The approach taken by politicians, legislators and government, however, has led to an onslaught of cases in the Canadian legal system. Instead of negotiated settlements and agreements through mutual respect, both the federal and provincial governments have postured in ways that seek to protect the interests of the Canadian state before recognizing the pre-existing sovereign and constitutional Aboriginal rights. When the term ‘pre-existing’ is used in s. 35, one can read into that recognition of the fact that Aboriginal peoples had, and continue to have, rights in spite of the assertions of Canadian sovereignty.

These recognized and affirmed rights were born in pre-existing sovereign Aboriginal communities and governments.³ In *Van der Peet*, the Supreme Court stated that the purpose of placing Aboriginal rights outside the *Charter* and inside the Constitution was to reach “[f]or reconciliation of the pre-existence of distinctive aboriginal societies occupying the land with Crown sovereignty.”⁴ As Professor Sákéj Henderson and Russel Barsh point out: “The key terms in this formula are ‘pre-existence’

³ See James (Sákéj) Youngblood Henderson, “Aboriginal Jurisprudence & Rights” in ed. Kerry Wilkins *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Edmonton: University of Alberta, 2004) at 68 where Professor Henderson states: “Aboriginal rights derive from pre-contact Aboriginal legal teachings that structure and inform the jurisprudence in the distinctive legal orders from which they emerge.”

⁴ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, [1996] 4 C.N.L.R. 177 at para. 42 [*Van der Peet* cited to S.C.R.].

and ‘reconciliation’.’⁵ The reason that these terms are significant is that the Supreme Court seemed to be making an effort to recognize that Aboriginal cultures existed before any Anglo-governments did in what is now Canada. The term reconciliation was an acknowledgement that Aboriginal peoples’ rights have always existed.

The doctrine of Aboriginal rights has been defined by the courts in a way that is consistent with the Canadian legal system – but not an Indigenous legal standard. More specifically, the judges of the Supreme Court who have presided over Aboriginal and treaty rights cases have been asked to determine the scope and context of the rights being contested.⁶ They have had to define Aboriginal rights in a manner which provides particular guidance regarding Aboriginal issues that are litigated in the Canadian courts.⁷

Aboriginal and treaty rights in Canada can be viewed through the application of general ideological, social and theoretical influences. I argue that the courts should undertake to understand the source of Aboriginal rights. In order to be successful at arguing an Aboriginal or treaty rights case one must be aware of the perspective that the Canadian courts have taken regarding Aboriginal rights. The Supreme Court in Canada may recognize Aboriginal and treaty rights, but the extent and meaning of those rights are confined to fit them into the Canadian legal consciousness.

⁵ *Supra* note 1 at 997.

⁶ Even though the protections of Aboriginal rights were placed outside the *Charter*, those rights are left largely undefined. See John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Constitution” (1997) 22 Am. Indian L. Rev. 37 at 38 [*Frozen Rights*] where he states:

The problem with this language was that no one was quite sure what Aboriginal rights were, and therefore what, if anything, was being protected....After the failure to define these rights through four high profile First Ministers conferences, and a nationally negotiated Charlottetown Accord, the task of defining Aboriginal rights passed to the country’s highest Court.

⁷ See also *supra* note 2 at s. 35:

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed to male and female persons.

4.1 Adjudication and Legislation.⁸

When a judge is presented with arguments surrounding Aboriginal rights she is forced to make law. The judge is required to give substance to the legislative recognition of the rights entrenched in s. 35. When a decision is required by adjudicators there are many factors that must be considered. As Professor Kennedy points out “[t]he law-making activity of judges takes place in the context of a structure of legal rules in the face of a particular gap, conflict, or ambiguity in the structure.”⁹ Such an activity is required when interpreting the rights found in s. 35 because there is a gap and ambiguity in establishing the claims for Aboriginal and treaty rights. There are always conflicts in determining Aboriginal and treaty rights. Conflict arises when existing Aboriginal and treaty rights, that have their source from pre-existing sovereign societies,¹⁰ are forced into being reconciled with the sovereignty of the Crown.¹¹

The legal rules that are in place to interpret Aboriginal and treaty rights have been derived from the jurisprudence of the Canadian common law. Kennedy elaborates on what the rules of law are:

That there be justiciable legal restraints on what one private party can do to another, and on what executive officers can do to private parties; that judges understand themselves to be enjoined to enforce these restraints independently of the views of the executive and the legislature, and of

⁸ See Duncan Kennedy, *A Critique of Adjudication {fin de siècle}* (Cambridge: Harvard University Press, 1997) at 26 where he states: “Whatever courts do is adjudication; whatever legislatures do is legislation.”

⁹ *Ibid.* at 1.

¹⁰ See John Borrows, “Creating an Indigenous Legal Community” (2005) 50 McGill L.J. 153 at 160 where he states: “Indigenous law flows from sources that lie outside of the common law and civil law traditions.... [a]boriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights.” See also *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 9 11, 199 D.L.R. (4th) 385 [*Mitchell* cited to S.C.R.] at 927. See also *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145 at 328 [*Calder* cited to S.C.R.] where it was held: “[w]hen the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.”

¹¹ For example see *Van der Peet*, *supra* note 4 at para. 3. Where Lamer C.J.C. states:

The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

political parties; that judges understand themselves to be bound by a norm of interpretive fidelity to the body of legal materials that are relevant to whatever dispute is before them.¹²

In a normative sense, Canadian citizens can expect that they automatically have individual rights within the Canadian democratic system.¹³ Further, separations are mandated by liberalism between the legislative and judicial branches. The separation between adjudication and legislation is necessary in arriving at just decisions in a democratic society.¹⁴

Aboriginal peoples in Canada, however, cannot automatically assume they have individual or collective rights under s. 35 of the Constitution. The Supreme Court can not or chooses not to apply an equitable understanding that respects First Nations' understandings of historic Aboriginal rights:

Sui generis Aboriginal orders constitutionalize Aboriginal peoples' own understandings of their relationships to the land and to their surrounding ecosystems. They are, in every sense, part of the ancient law of the land. They do not require a sovereign, the will of a political state, or the affirmation of outsiders to be legitimate.¹⁵

The nature and source of Aboriginal and treaty rights is what makes them constitutional rights; not the fact that these rights are recognized under s. 35.

The premise generally followed by the courts in determining Aboriginal and treaty rights is outlined in *R. v. Sparrow*. "The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the

¹² Kennedy, *supra* note 8 at 2.

¹³ *Ibid.*

¹⁴ *Ibid.* at 27.

¹⁵ Henderson, *supra* note 3 at 71.

constitutional provision itself.”¹⁶ Constitutional recognition acts as the starting point for analysis by the Supreme Court regarding Aboriginal rights in Canada.¹⁷

4.2 Adjudication of Aboriginal Law in Canada through the *Van der Peet* Principles.

4.2.1 The distinctness of First Nations and Métis perspectives.

When an Aboriginal litigant enters the courtroom in Canada, one does so as an alien to the law to which one is being subjected. The Supreme Court will not consider claims of control or jurisdiction over land that has been under the stewardship of Indigenous peoples since time immemorial.¹⁸ Instead of considering issues of the legitimacy of the Canadian state’s control over Aboriginal lands, the Supreme Court looks to ‘accommodate’ Aboriginal or treaty rights within its legal confines. This approach ensures the least amount of interruption to the state’s sovereignty or assumed control of the land.¹⁹

The Constitution of Canada affirms the existence of Aboriginal and treaty rights. It must be asked, however, what does this recognition mean for Aboriginal peoples when they seek to protect their inherent rights from government, industrial or individual interference? As Borrows points out, the Supreme Court tells us what Aboriginal

¹⁶ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] S.C.J. No. 49 at 1106 [*Sparrow* cited to S.C.R.].

¹⁷ See *Reference re: Manitoba Language Rights*, [1985] 1 S.C.R. 721, [1985] S.C.J. No. 36 at 745 [*Reference re: Manitoba Language Rights* cited to S.C.R.]:

The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the Constitution Act, 1982 declares, the ‘supreme law’ of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.

¹⁸ See *R. v. Delgamuukw*, [1997] 3 S.C.R. 1010, [1997] S.C.J. No. 108 [*Delgamuukw* cited to S.C.R.] at para. 7 where Lamer C.J.C. acknowledged a change of the original statement of claim: “Their claim was originally for ‘ownership’ of the territory and ‘jurisdiction’ over it. (At this Court, this was transformed into, primarily, a claim for aboriginal title over the land in question.)” [*Delgamuukw*].

¹⁹ See *Van der Peet* *supra* note 4 at para. 49 per Lamer C.J.C. “Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada.”

customs qualify as rights to be protected by the law.²⁰ “[I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”²¹ Once this rule was established by the Supreme Court it became another primary principle for the Supreme Court to follow in subsequent litigation.

In considering a claim of an Aboriginal litigant it is crucial that the Supreme Court considers the Aboriginal perspective.²² It would seem logical to ask the Aboriginal litigant what the right meant to the community that one is from, how the right was traditionally exercised and what the right means to one’s society in a modern context. The consideration of the Aboriginal perspective from *Sparrow* was altered in *Van der Peet*. It was held by the Supreme Court that in order for Aboriginal laws to be understood by Canadian judges the Aboriginal perspective needs to be adjusted for interpretation in the Canadian legal system.²³ The interpretive approach by the judiciary could be a symbolic door that is opening to truly reconcile the Aboriginal rights of the Métis with those of the Canadian legal conscience. A potentially new interpretation of Aboriginal rights lends itself to Métis jurisprudence where the laws of both Europeans and Aboriginal peoples are combined into one perspective.

In *Van der Peet*, a Sto:lo woman was charged for selling ten salmon caught under a fishing license issued by the British Columbia government. The *British Columbia Fishery (General) Regulations* prohibits the sale or barter of fish caught under the

²⁰ Borrows, *supra* note 10 at 43.

²¹ *Van der Peet*, *supra* note 4 at para. 46 per Lamer C.J.C.

²² *Sparrow*, *supra* note 16 at 1112. See also where Dickson C.J.C. stated that “[i]t is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.”

²³ Borrows, *supra* note 6 at 46.

license.²⁴ Dorothy Van der Peet alleged that her Aboriginal rights were being violated by the *British Columbia Fishery Regulations*. The constitutional test for Aboriginal rights established in *Van der Peet* required that an Aboriginal claimant prove the activity or practice that is being claimed for protection was integral to the culture.

[T]he test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.²⁵

The test established by the Supreme Court requires the Aboriginal claimant to show that practices that existed pre-contact must have a central significance to the Aboriginal group. Lamer C.J.C. however, placed a modifier on the nature of the right as Borrows states that “Aboriginal rights protect only those customs which have continuity with practices existing before the arrival of Europeans. Aboriginal rights do not sustain central and significant Aboriginal practices which developed solely as a result of their contact with European cultures.”²⁶

Is there a less restrictive middle ground that can be found in the approach to reconcile the rights of Aboriginal peoples with Canadian laws? That middle ground can be found in lands of Métis jurisprudence. The Métis as a people offer the courts in Canada the perfect opportunity to reconcile rights.

A positivist approach that is consistent with *Sparrow* would try to find a middle ground which keeps the right being sought in a form that is consistent with the traditional values of the Aboriginal society. This approach would have allowed for an historic

²⁴ *British Columbia Fishery (General) Regulations*, SOR/84-248, s. 27(5) [ad. SOR/85-290, s. 5] “No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.”

²⁵ *Van der Peet*, *supra* note 4 at para. 44 per Lamer C.J.C.

²⁶ Borrows, *supra* note 6 at 44.

Aboriginal right to be influenced or shaped by external influences and a consideration of what the practice means to the community that an Aboriginal person is from.

Lamer C.J.C. was not consistent with his approach to interpreting established case law. As Borrows observes, the court in *Van der Peet* changed the approach suggested by Dickson C.J.C. in being sensitive to the Aboriginal perspective.

[I]n *Van der Peet* they modified this approach and stated that the Aboriginal perspective must be ‘framed in terms cognizable to the Canadian legal and constitutional structure’²⁷ to incorporate both Aboriginal and non-Aboriginal legal perspectives. This reformulation substantially weakened the potential for Aboriginal claimants to express the law on their own terms, according to their own customs.²⁸

My idea of a middle ground is one that avoids confining Aboriginal rights into the box of the Canadian common law. With Métis jurisprudence, however, like the combining of blood to create a distinct people, there exists an opportunity create a jurisprudence that is respectful to both the Métis and the Canadian legal consciousness.

Borrows points out the dangers of a confining approach for First Nations peoples:

To facilitate an understanding among Canadian judges, Aboriginal laws will need reframing and reinterpretation. This creates the very real danger of mischaracterizing Aboriginal law in order to make it “fit” another system, and thus not accurately protect the underlying context and reason for the rules existence within the Aboriginal community.²⁹

It is logical to believe that in order to find a balance of the rights and interests in a decision regarding Aboriginal rights that the perspective of the Aboriginal peoples would be needed.³⁰ Lamer C.J.C. was performing judicial legislation and not law application;

²⁷ *Van der Peet*, *supra* note 4 at para. 49 per Lamer C.J.C.

²⁸ Borrows, *supra* note 6 at 46.

²⁹ *Ibid.*

³⁰ See *ibid.* where Borrows states:

It seems unusual that the Aboriginal perspective on the meaning of their rights must incorporate non-Aboriginal legal perspectives. One would think that the Aboriginal perspective is needed precisely because the non-Aboriginal perspective does not effectively reconcile the prior occupation of Canada with assertions of Crown sovereignty.

and did so in manner that was not consistent with finding reconciliation between colonial law and the traditional laws of Aboriginal peoples.³¹

Dickson C.J.C. outlined the necessity of careful acknowledgement of the Aboriginal perspective in *Sparrow* when he stated that “[w]hile it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.”³² A sensitivity to the Aboriginal perspective would have asked the Sto:lo people what the right meant to them and how it could be reconciled with the Canadian common law that would satisfy their perspective of the right.

What the Supreme Court failed to understand in *Van der Peet* was that “Aboriginal jurisprudence existed before the imperial Crown asserted and enforced its sovereignty: prior even to contact between Aboriginal and European societies. They are the source of Aboriginal rights.”³³ The Supreme Court limits protections of Aboriginal rights to those activities that can be proven to be a integral to an Aboriginal society. Placing such a limitation on the protections afforded to Aboriginal rights shows how the Canadian legal system failed to understand that Dorothy Van der Peet was exercising the logical evolution³⁴ of a right from bartering to commercial trade. This was the transformation of context from Aboriginal economy to a mixed economy with the Europeans. At the same time, this transformation was coincided with the fusion of legal

³¹ *Van der Peet*, *supra* note 4 at para. 145 where Madam Justice L’Heureux-Dube in dissent states that “I do not think it appropriate to qualify this proposition by saying that the perspective of the common law matters as much as the perspective of the native when defining [A]boriginal rights.”

³² *Sparrow*, *supra* note 16 at 1078.

³³ Henderson, *supra* note 3 at 70.

³⁴ For a description of what is meant by the logical evolution of an Aboriginal or treaty right see *R. v. Marshall*, [1999] 3 S.C.R. 533, [1999] S.C.J. No. 66 at para. 20 [*Marshall* cited to S.C.R.]. See also *R. v. Marshall*; *R. v. Bernard*, [2005] S.C.J. No. 44, [2005] SCC 43 at para. 25 [*R. v. Marshall*; *R. v. Bernard* cited to S.C.J.].

traditions, this fusion has become central to the definition of Aboriginal rights. Instead, Lamer C.J.C. only looked at one side of the transformation; he held that there was no proof that the trade of fish for money was integral to the Sto:lo people.

An alternative approach by the Lamer Court could have balanced the influence that Europeans had on traditional Aboriginal customs between the Sto:lo people and the Hudson's Bay Company. Lamer C.J.C. accepted the lower court's reasoning that European influence was the primary factor that the practice of trading fish was in place.

The trade of salmon between the Sto:lo and the Hudson's Bay Company does not have the necessary continuity with Sto:lo culture pre-contact to support a claim to an aboriginal right to trade salmon. Further, the exchange of salmon between the Sto:lo and the Hudson's Bay Company can be seen as central or significant to the Sto:lo primarily as a result of European influences; activities which become central or significant because of the influence of European culture cannot be said to be aboriginal rights.³⁵

Instead of allowing a trading right to evolve into a modern day practice, the Supreme Court denied that commercial trading could be a modern right because of the interactions with European traders.

A future problem will arise regarding the perceptions of European influence. With the Métis traders it could be argued that the essence of the right to trade is primarily based on the influence of Europeans' heritage and economy. Part of what made the Métis an important part of the expansion of the west by the colonizers was the ability of the Métis to participate in the fur trade economy, which was the base for establishing the Canadian economy. Will the Supreme Court look at the reasoning from Lamer C.J.C. and conclude that the Métis can not have a right to trade because of the influence of the Europeans? The Métis are part European and part First Nations and that is part of what

³⁵ *Van der Peet*, *supra* note 4 at para. 89 per Lamer C.J.C.

makes the Métis distinct peoples. To deny the Métis this right would be to deny who they are.³⁶ Commercial trading is an integral part of Métis rights, culture and identity.

What the Supreme Court did was eliminate, in the area of First Nations' Aboriginal rights, any consideration of the influence of what Europeans had on Aboriginal activities. This would be tantamount to insist that any practices or traditions after 1867 which can be derived from Britain can not be Canadian rights because of the influence of the British. Furthermore, Borrows states: "This decision relegated Aboriginal peoples to the backwaters of social development, deprived them of protection for practices that grew through intercultural exchange, and minimized the impact of Aboriginal rights on non-Aboriginal people."³⁷ Canadians do not have rights that can be derived from inter-cultural exchange denied – why demand that of Aboriginal rights? Lamer C.J.C. failed to consider the crucial perspective of Sto:lo jurisprudence and their ancient rights.³⁸

This failure to properly address the Aboriginal perspective can not be left to the judiciary alone. As Professor Henderson points out:

In part, no doubt, this is because neither courts nor lawyers have properly introduced the Aboriginal teachings into litigation concerning Aboriginal rights. They have not yet acknowledged Aboriginal Elders and law-keepers as expert witnesses on Aboriginal law and jurisprudence and not asked them properly to share their teachings with the courts.³⁹

³⁶ If the Métis are successful in such an argument there is the potential that First Nations could follow the same line of reasoning based on these interactions. Indeed, one Aboriginal group cannot 'piggyback' on the rights of another group, but it could open the door for the legal system to possibly consider an **inherent** Aboriginal right to trade commercially in areas that are not covered by the *NRTA*. [emphasis added]

³⁷ Borrows, *supra* note 6 at 45.

³⁸ *Sparrow*, *supra* note 16 at 1112 per Dickson C.J.C. and La Forest J where it was held that "[i]t is crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."

³⁹ Henderson, *supra* note 3 at 77.

When the Imperial power was in place for the colonizers, the colonists were not to interfere with the Indigenous order.⁴⁰ The lawyers and judges of today do not seem to be very proactive in remembering this type of order. The people that do remember these things are the Elders, some Aboriginal lawyers and academics who have been brought up in a traditional way of life.

A further inconsistency with the reasoning in *Van der Peet* is the failure of the Lamer Court to properly adapt the logical development of a right. Dickson C.J.C., citing Professor Slattery with approval, referred to the term existing in section 35 that “[t]he word ‘existing’ suggests that those rights are affirmed in a contemporary form rather than in their primeval simplicity and vigour.”⁴¹ If the means to exercise an Aboriginal right, such as fishing, is to utilize modern forms of equipment (*i.e.* motor boats, gasoline, rod and reel *etc.*), why was the Supreme Court reluctant to recognize the contemporary form of trade that the Sto:lo people are now undertaking in a modernized form? It could be argued that the Supreme Court is exercising a protectionist attitude toward the entitlement of non-Aboriginal peoples in maintaining the *status quo* regarding the appropriate recognition of Aboriginal and treaty rights. In *Powley* McLachlin C.J.C. does follow the suggestion that the test for Aboriginal rights would have to be modified in order to deal with the Métis.

⁴⁰ See *The Queen v. Secretary of State for Foreign & Commonwealth Affairs*, [1981] 4 C.N.L.R. 86 (Eng. C.A.) at 91-93 where the *Royal Proclamation, 1763*, reprinted in R.S.C. 1985 App. II, No.1:

[w]as regarded as of high constitutional importance...[i]t was equivalent to an entrenched provision in the Constitution of the colonies in North America. It was binding on the Crown ‘so long as the sun rises and the rivers flows’....[i]t was an unwritten provision....[that] was binding on the legislature of the Dominion of the Provinces just as if there had been included in the [1867] statute a sentence: ‘The Aboriginal peoples of Canada shall continue to have all their rights and freedoms as recognized by the royal proclamation 1763.’

⁴¹ *Sparrow*, *supra* note 16 at 1013 per Dickson C.J.C. citing Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727 at 782.

At the time when this Court is presented with a Métis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Métis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question. It may, or it may not, be the case that the claims of the Métis are determined on the basis of the pre-contact practices, customs and traditions of their aboriginal ancestors; whether that is so must await determination in a case in which the issue arises.⁴²

The McLachlin C.J.C. decision in *Powley* is an example of how a reconciled middle ground can be attained with some creative approaches.

[T]he pre-contact aspect of the *Van der Peet* test requires adjustment in order to take account of the post-contact ethnogenesis of the Métis and the purpose of s. 35 in protecting the historically important customs and traditions of these distinctive peoples. While the fact of prior occupation grounds aboriginal rights claims for the Inuit and the Indians, the recognition of Métis rights in s. 35 is not reducible to the Métis' Indian ancestry. The unique status of the Métis as an Aboriginal people with post-contact origins requires an adaptation of the pre-contact approach to meet the distinctive historical circumstances surrounding the evolution of Métis communities.⁴³

The *Van der Peet* test was adjusted because showing a practice was integral through the Métis ancestors would deny the recognition of the Métis as a distinct people under s. 35 of the *Constitution Act, 1982*.⁴⁴ Further, the test from *Van der Peet* was altered in a way so the date of effective control over a specific area that the Métis inhabited was incorporated to determine whether a tradition, custom or practice was integral to a Métis Aboriginal community.⁴⁵

Even though, the Métis won the *Powley* case, there are still challenges that came along with that decision. The Métis are now limited to hunting in their traditional community to which they can show an ancestral connection. Further, if a Métis person does not reside in the community that he is hunting in, then he is hunting illegally.

⁴² *Van der Peet*, *supra* note 4 at para. 67.

⁴³ *R. v. Powley*, [2003] 2 S.C.R. 207, [2003] 4 C.N.L.R. 321 [S.C.C.] at para. 36. [*Powley* cited to C.N.L.R.].

⁴⁴ See *ibid.* at para. 38.

⁴⁵ See *ibid.* at para. 38. See also *R. v. Willison*, [2005] B.C.J. No. 924, 2005 BCPC 131[*Willison*], *R. v. Laviolette*, [2005] S.J. No. 454, 2005 SKPC 70 [*Laviolette*] where the principles of *Powley* were applied in determining whether hunting and/or fishing was a tradition, custom or practice that was to be protected by law from governmental interference.

Powley leaves no room for the community to grant access to Métis from other communities, which would be part of their historic relationships. Also, the Supreme Court has judicially defined a Métis community. The definition of community should have been left to the Métis. The Powleys were forced to provide proof of an historic community. This does not seem logical as the Canadian legal system does not have to provide proof that it has legitimate authority to rule on all Métis issues.

How are Métis to understand what is meant by reconciliation?:

Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867. These powers must, however, now be read together with s. 35(1). In other words, federal power must be **reconciled** with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.⁴⁶ [added emphasis]

Professor Henderson suggests that the intent of the Dickson Court was to limit federal power regarding the limitations placed on Aboriginal rights when “[t]he Dickson Court used ‘reconciliation’ to refer to a limitation on federal power, while the Lamer Court used the same term to limit further the [definition and] scope of Aboriginal rights [of First Nations peoples].”⁴⁷ As Henderson points out, this is not consistent with one of the constitutional negotiator’s intentions for s. 35. Henderson cites former Saskatchewan Premier Roy Romanow where he stated that “[o]ne can argue that the purpose of inserting ‘existing’ might be to freeze aboriginal rights as defined on 17 April 1982, but....that view, which is offered by many credible constitutional lawyers, is one that I do not share.”⁴⁸ Consequently, McLachlin J. (as she was known then) in dissent, wrote that the implications of Lamer’s C.J.C. decision was to “[f]reeze [A]boriginal societies in

⁴⁶ *Sparrow*, *supra* note 16 at 1109, per Dickson C.J.C.

⁴⁷ Henderson, *supra* note 1 at 999.

⁴⁸ Roy Romanow, “Aboriginal Rights in the Constitutional Process” in M. Boldt & J.A. Long, eds., *The Quest For Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 73 at 81. Consequently, Lamer C.J.C. rejected this approach.

their ancient modes and deny to them the right to adapt, as all peoples must, to the changes in the society in which they live.”⁴⁹

4.2.2 Nature of the claim being made.

Aboriginal rights are seen as collective/communal rights – not individual.⁵⁰ In order to properly identify the right being claimed specification of the right is necessary including that “[t]he nature of the action which the applicant [was] claiming was done pursuant to an Aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the tradition, custom or practice being relied upon to establish the right.”⁵¹ In *R. v. Gladstone* the defendants, Donald and William Gladstone, were charged with selling herring spawn on kelp collected under a food-fishing license.⁵² They were charged for violating the *Pacific Herring Fishery Regulations*.⁵³ The Gladstones contended that they were protected by section 35 of the *Constitution* and by the operation of s. 52 where provincial legislation had no force or effect on their attempts to sell herring on kelp.⁵⁴ It was held that there was a limited commercial right to sell fish that was not incidental to trade with Europeans.

⁴⁹ *Van der Peet*, *supra* note 4 at para. 240.

⁵⁰ *Delgamuukw*, *supra* note 18 at para. 31. Also see *Van der Peet* *supra* note 4 at para 41. It must be pointed out however, that this principle could seemingly be challenged as s. 35(4) *supra* note 2. “Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.” This could be interpreted as an individual right to exercise those rights from historic Aboriginal communities and those rights protected under s. 35(1) of the *Constitution*. See also *R. v. Powley*, [1999] 1 C.N.L.R. 153, [1998] O.J. No. 5310 (Prov. Ct.) at para. 22 [Powley cited to C.N.L.R.].

⁵¹ *Van der Peet*, *supra* note 4 at para. 53 per Lamer C.J.C.

⁵² *R. v. Gladstone*, [1996] 2 S.C.R. 723, [1996] 4 C.N.L.R. 65 [*Gladstone*].

⁵³ *Pacific Herring Fishery Regulations*, SOR/83-324, s. 20(3). “No person shall buy, sell, barter or attempt to buy, sell, or barter herring spawn on kelp other than herring spawn on kelp taken or collected under the authority of a Category J licence.”

⁵⁴ *Constitution Act, 1982*, R.S.C. 1985, App. II. No 44:

s. 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

(a) the *Canada Act 1982*, including this Act;

(b) the Acts and orders referred to in the schedule; and

The importance of recognizing a limited commercial right is pointed out by Borrows regarding *Gladstone* was:

[a] significant finding because it confirmed that Aboriginal peoples can possess constitutionally-protected commercial rights. By holding that an Aboriginal right could exist at this level of generality, the Court held out a thin thread of hope for Aboriginal peoples seeking more encompassing rights. The Gladstone case demonstrated that precise rights to a practice may also evidence more general rights. This step by step approach to defining Aboriginal rights underlines the Court's hesitancy to articulate them more broadly.⁵⁵

Ultimately, the final understanding of the Aboriginal practice or custom is framed into the context of Canadian legal consciousness in order for it to receive constitutional protection. This is the essence of Métis Aboriginal rights, the reconciliation of the best of First Nations' laws and European laws to produce the hybrid of Métis legal rights.

The Supreme Court utilized the case-by-case⁵⁶ approach to justify its position of differentiating rights between First Nation and Métis communities. This approach places limits on how Aboriginal rights can be recognized before Canadian courts. What is more, after the *Powley* decision one could have thought that provincial governments in Canada had direction from the Supreme Court to start negotiating hunting rights with the Métis in their respective provinces and communities. This has not been the approach taken by provinces such as Saskatchewan, Ontario, Manitoba and British Columbia. These provinces have embraced the case-by-case approach and have chosen to litigate – not negotiate. By litigating the provinces remain in control of a power imbalance. A particular province has very little to risk when a court decides that it has violated treaty or

(c) any amendment to any Act or order referred to in paragraph (a) or (b).”
⁵⁵ Kennedy, *supra* note 8 at 48. Also see *Kruger v. The Queen*, [1978] 1 S.C.R. 104, 75 D.L.R. (3d) 434.
⁵⁶ See *Sparrow*, *supra* note 16 at 1111. Also see *Corbiere v. Canada*, [1999] 3 C.N.L.R. 19 (S.C.C.), [1999] 2 S.C.R. 203; *Delgamuukw*, *supra* note 18, *Gladstone*, *supra* note 52, *Matsqui Indian Band v. Canadian Pacific Ltd.*, [1995] 2 C.N.L.R. 92 (S.C.C.), [1995] 1 S.C.R. 3; *R. v. Badger*, [1996] 1 S.C.R. 771, [1996] 2 C.N.L.R. 77; *Powley*, *supra* note 43; and *R. v. Sundown*, [1999] 1 S.C.R. 393, [1999] S.C.J. No. 13.

Aboriginal rights. On the other hand, the Aboriginal peoples have everything to lose in a provincial or federal court.

It is relevant to consider Kennedy's comments on the case-by-case approach utilized by American judges. It is suggested by Kennedy that judges claim the case-by-case approach is limited to the legal materials and their claims that individual politics do not play a role is not entirely true.⁵⁷ Judges claim to be neutral regarding legal decisions⁵⁸ and when they are faced with hard cases they arrive at their conclusions based on legal necessity.⁵⁹ The case-by-case approach, however, also forces needless litigation and cost to both the Aboriginal person and group involved and to the taxpayers that must pay the bills for the army of lawyers which the provincial and federal departments of justice unleash to fight Aboriginal treaty and rights claims.

As Dworkin argues in his essay, "The Model of Rules",⁶⁰ western legal systems are based on application of principles. These principles act as precedents to provide a framework for analysis and form the basis for decisions about conflicts. Greater flexibility in principles provide more flexibility than hard and fast rules like those in civil law. The principled approach provides a level of consistency for adjudication.⁶¹ One must ask what level of consistency can be reached when Aboriginal cases are approached on a case-by-case basis.

Principles can apply in Aboriginal cases, but these precedents do not give the answers – just directions for the case at bar. The distinction is that law is treated differently based on the location of an alleged offence. Instead of law dictating what the

⁵⁷ See Kennedy, *supra* note 8 at 28.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* at 29.

⁶⁰ R.M. Dworkin, "The Model of Rules" (1967) 35 U. Chicago L. Rev. 14.

⁶¹ See Henderson, *supra* note 1 at 1006 where Henderson comments on the Dworkinian analysis.

outcome a trial will be; the locations of alleged offences are used to determine the applicable law.

The *Gladstone* case was able to show that a limited right to fish commercially existed; however, the Sto:lo people in *Van der Peet*, who are neighbours of the litigants in *Gladstone*, were found not to have the same right. The case-by-case approach entirely ignores the principles of legal precedent and the legal requirement that judges follow the rules that have been established in preceding cases. Even if the courts were to follow the rules of applying precedent, we are still left in a situation where we have to apply faulty principles from preceding cases.

Even though, the Provincial Court in Meadow Lake, Saskatchewan in *Laviolette* affirmed a Métis right to hunt, fish and trap out of season in the Northern Administrative District; the Métis in the south can not exercise the same rights. The contextual approach draws lines in the sand, or in the prairie as it may be, that act as colonial legal barriers for Aboriginal peoples wishing to exercise their inherent rights from their governmental structures in the past. The Saskatchewan Government, even after the *Laviolette* decision, has shown no interest in negotiating with the Métis Nation - Saskatchewan for hunting rights in the southern parts of the province.⁶²

Willison also demonstrated a similar approach to the interpretation of Métis rights in British Columbia. The limit of which Métis could hunt or fish was applied from the

⁶² See "Interim Harvesting Agreement," online: Aboriginal Affairs and Northern Development, Government of Alberta <<http://www.aand.gov.ab.ca/PDFs/Metis%20Harvesting%20Fact%20Sheet.pdf>> (as of November 14, 2005) at 2 where it is stated that: "Saskatchewan is not currently in discussions with its Métis organizations." What should also be noted is that the Saskatchewan government does not currently recognize the President of the Métis Nation, Dwayne Roth, as a legitimate leader with whom to negotiate. The prevalence of electoral fraud and pending criminal charges has led the Saskatchewan government (justifiably) to abstain from negotiations regarding hunting rights with the Métis Nation - Saskatchewan until a new leader is in place.

Powley decision. That limit would only ‘allow’ Métis that have historic genealogical ties to that community and reside there to hunt or fish

At the same time, a contextual analysis might be beneficial to some Aboriginal peoples when highly developed or ‘distinctive’ complex cultural factors are at stake. For example, when the Métis decide to make an argument for commercial hunting or fishing rights as a part of their Aboriginal rights and traditional law, they have a unique approach, that First Nations do not.

The case-by-case approach, however, forces litigation on a level that is not comparable to any other area of law in Canada. Professor Henderson comments on the outcome of a case-by-case approach:

As a result, First Nations will bear even greater uncertainty as to the extent of their resources, and the scope of their political authority. More community resources will be devoted to defensive litigation, and the volatility and unpredictability of First Nations’ rights and jurisdiction will deter investment on reserves. Reserves may turn to higher-risk investments, including those on the edge of legality such as casino gambling, simply because they generate sufficiently large profits to pay the costs of defending the right to pursue them.⁶³

The case-by-case approach denies the establishment of continuity in Canadian jurisprudence. The Supreme Court justifies this approach by stating that the mere fact that one society had established a right that recognition did not necessarily indicate that all Aboriginal peoples or communities could claim that same right.⁶⁴

Aboriginal cases are considered as site specific rights. Any ruling made is based on the specific locality of the claim. One must ask if the treatments of *Charter* issues are site specific. Do the protections of the *Charter* apply only to the place that the violation

⁶³ Henderson, *supra* note 1 at 1006.

⁶⁴ *Van der Peet*, *supra* note 4 at para. 69 where Lamer C.J.C. states:

Aboriginal rights are not general and universal; their scope and content must be determined on a case-by-case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.

of the government action occurred? No, when the specific violation is recognized by a Court that principle applies to similar fact situations across Canada. A similar approach for constitutional violations, other than s.35, applies as well. When other people or communities establish a right others can rely on the protection found in that principle. When a jurisdictional issue is decided in the courts that ruling applies to similar cases that arise in all provinces in Canada – not just to the one province where the issue arose. Indeed, Aboriginal rights are *sui generis*, but the approach of the courts could also be called *sui generis* based on its unique approach to Aboriginal and treaty rights cases in Canada and its interpretation of s. 35 rights.

To further the point that the approach of the Canadian legal system to Aboriginal or treaty rights is *sui generis*, one can look at s. 52(1) of the *Constitution Act, 1982*. It is stated in s. 52(1) that: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”⁶⁵ If one can show that a law in the province, such as the *Wildlife Act* in Saskatchewan makes no consideration for the Métis right to hunt under that act then why should a trial proceed against a Métis person that has been charged? It would seem that by not having allowances for Métis hunters in the *Wildlife Act* is a direct violation of s.35 and is therefore invalid under s.52 of the Constitution and should be struck down. Instead, as in *Powley*, *Lavolette* and *Willison* the accused is forced to prove that he is a Métis and that his actions were constitutionally consistent with s. 35. Yet it is clear that the lack of a provision for Métis rights to hunt is a violation of s.35 and is therefore invalid under s. 52. Why would an Aboriginal accused have to show that he

⁶⁵ *Constitution Act, 1982*, s. 52(1) *supra* note 54.

or she has protection under s.35 of the *Constitution Act, 1982* if it can be shown that the legislation in question is inconsistent with the Constitution and thus invalid under s. 52?⁶⁶

It has been suggested that negotiations between the Crown and the Aboriginal group is a preferred method of resolving disputes regarding Aboriginal issues.⁶⁷ Negotiation of the claims of the Métis would involve representatives from government, municipalities, and the First Nations group(s) to try and resolve claimed or asserted rights through mutual agreements. This is a preferred method to litigation because of the cost involved to all parties. How can a Métis group negotiate when the context of legal rules changes depending on the location of each case? The balance of power remains with the Crown when Métis cases go to court. No matter what the decision is by the Supreme Court, the Métis group will always face new challenges that arise from a victory in the Canadian legal consciousness.

In consideration of the difficulties that lay within negotiated settlements perhaps it is time to look at alternative measures for Aboriginal and treaty rights cases. Does an independent tribunal have appeal to other Métis groups like the Métis Settlements Appeals Tribunal in Alberta? Perhaps a third level of government equal to that of the Federal Government could provide the equity that Métis groups are so desperately seeking. It may be time that the Métis and First Nations enter into binding agreements

⁶⁶ For a discussion on s. 52 see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] S.C.J. No. 17. See also Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1999) at 771-793.

⁶⁷ Sparrow, *supra* note 16 at 1105 per Dickson C.J.C. See also *Marshall*, *supra* note 34 per Lamer C.J.C and L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci and Binnie JJ. See also *Delgamuukw* *supra* note 18 at paras. 36, 70, 186, and 195. As much as it may be desirable to place faith in the common law principles of the Canadian state jurisdiction and the results of that 'authority' have not exactly been productive or protective of Métis. For example see *The Queen v. Louis Riel* (Toronto: University of Toronto Press, 1974) where part of the argument presented by Louis Riel against the charge of high treason was the lack of jurisdiction that the North-West Territory Court had over him and the Métis people. Written decision of the Riel trial are available at "The Trial of Louis Riel: Decisions on Appeal," online: University of Missouri-Kansas City School of Law<<http://www.law.umkc.edu/faculty/projects/ftrials/riel/appellatedecisions.html>> (as of February 11, 2006).

between each other and make the governments of Canada come to negotiate with them and force Canada to show where it belongs in Métis and First Nations' jurisprudence.

With the hope of Métis litigants holding on by a thread to find justice, something needs to be done within the Canadian legal system to strengthen that thread and weave it into something tangible and equitably consistent to the Métis in Canada. Despite the skepticism of the utility of the decisions of the Supreme Court, there are some positives that can be found in Canadian jurisprudence. When it is realized that Constitutionalism in Canada can be used as a shield against the sword of protectionist attitudes from the judiciary and the Canadian governments, there is a glimmer of hope:

Delgamuukw, for example, has explicated what it has meant to the Canadian constitutional order to give full effect to Aboriginal rights. It has demonstrated how the term 'Aboriginal rights' implicitly constitutionalized Aboriginal title, a right to the land itself, in its full form. It has recognized the significance to the law of Aboriginal title of the pre-existing systems of Aboriginal law and tenure that belong to the various Aboriginal nations, societies, or orders. And it has affirmed that Aboriginal peoples' laws, practices and traditions must be given meaningful content beyond the existing common law definitions.⁶⁸

This recognition of the positive findings that can be extracted from some cases in Canada can be used to build on new approaches in dealing with Aboriginal and treaty rights of Métis people and not the bureaucracies, governments or judicial systems of colonial rule.

4.2.3 Continuity of the rights.

Another factor that is considered in *Van der Peet* for establishing an Aboriginal right is the question of continuity. The doctrine of continuity was first expressed in a

⁶⁸ Henderson, *supra* note 3 at 69. See *Van der Peet*, *supra* note 4 at para. 28 where Lamer C.J.C. stated: "In identifying the basis for the recognition and affirmation of aboriginal rights it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights." See also *Delgamuukw*, *supra* note 18 at para. 136 where it was held: "I hasten to add that the constitutionalization of common law aboriginal rights by s. 35(1) does not mean that those rights exhaust the content of s. 35(1)." See also *R. v. Côté*, [1996] 4 C.N.L.R. 26, [1996] 3 S.C.R. 139 [cited to S.C.R.] at para. 52:

Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal recognition and approval of European colonizers.

Scottish case regarding land rights and the annexation of land to England.⁶⁹ The doctrine of continuity was then applied overseas to other countries in the British Empire.⁷⁰ This doctrine, in the context of *Van der Peet*, was seen as: “The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact.”⁷¹ This approach in *Van der Peet* differed from the one taken in *Sparrow* by Dickson C.J.C.

The Supreme Court in *Van der Peet* required that the First Nation litigant meet the requirement of continuity. Again, the approach by Lamer C.J.C. was not consistent with the inherent recognition that the Dickson Court held in *Sparrow* when it referred to a statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development (as he was then known):

[s]ignify the Government’s recognition and acceptance of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians, which it regarded as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people’s interests in land in this country.⁷²

Chief Justice Dickson added that: “[t]he statement went on to express, for the first time, the government’s willingness to negotiate regarding claims of aboriginal title, specifically in British Columbia, Northern Quebec, and the Territories, and this without regard to formal supporting documents.”⁷³ This recognition by Minister Chrétien does not seem to correspond with the explicit requirements established in *Van der Peet*. Indeed, the

⁶⁹ *Calvin’s Case* (1608), 7 Co. Rep. 1a at 17b, 77 E.R. 377 at 398 (K.B.).

⁷⁰ *Campbell v. Hall* (1774), 1 Cowp. 204 at 209-10, 98 E.R. 1045 at 1047-48 (K.B.).

⁷¹ *Van der Peet*, *supra* note 4 at para. 59 per Lamer C.J.C.

⁷² See *Sparrow*, *supra* note 16 at 1106 as mentioned by the court. See the statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People, August 8, 1973.

⁷³ *Marshall*, *supra* note 34 at para 51.

statement by Chrétien was in the context of policy,⁷⁴ however, it was one that was accepted by the Dickson Court in *Sparrow* in its analysis of the Musqueam people's claims of Aboriginal rights to fishing.

There was recognition about relaxing the rules of evidence regarding the claims of Aboriginal peoples. "The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case."⁷⁵ This reconciliation could be seen as a middle ground for Aboriginal peoples when they enter into the colonial Canadian courts, but it is reconciliation to a rule that was created by the Canadian legal system. "It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure."⁷⁶ It is fair to ask if this approach gives adequate weight to the Aboriginal perspective.

Lamer C.J.C. in *Van der Peet* 'created' law regarding the establishment of claims in the context of the doctrine of continuity. This approach does not provide consistency regarding the rights of Canadians who do not need to establish a pre-existing continuity of their rights in the context of Canadian law. "The rights of other Canadians are not limited to those practices which have continuity with their activities prior to their first arrival in North America. They would find such a limitation as the gravest form of injustice."⁷⁷ Yet, the Lamer Court rationalized this interpretation of Aboriginal rights by

⁷⁴ See *Sparrow*, *supra* note 16 at 1105 where Dickson C.J.C. stated: "It is obvious from its terms that the approach taken towards aboriginal claims in the 1973 statement constituted an expression of a policy, rather than a legal position...."

⁷⁵ *Van der Peet*, *supra* note 4 at para. 68 per Lamer C.J.C. See *Delgamuukw* *supra* note 18 at para. 82 where Lamer C.J.C. stated that "In other words, although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly sui generis, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples."

⁷⁶ *Van der Peet*, *supra* note 4 at para. 49.

⁷⁷ *Borrows*, *supra* note 6 at 49.

stating “[i]t is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by section 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.”⁷⁸ Again we see an approach by the court to freeze the rights in their ancient form⁷⁹ and the “[i]nherent inequity in creating non-Aboriginal rights following contact and not extending this same entitlement to Aboriginal peoples.”⁸⁰ In addressing Métis rights the legal consciousness of the Canadian legal order is required to be innovative and dynamic and the same type of limitations may not apply to Métis jurisprudence.

The Canadian legal system views the Constitution as being a living tree⁸¹ in that the Constitution is viewed as a document that is capable of growth and expansion from its original form. Aboriginal and treaty rights, that are supposed to be protected by Constitution, are treated in a manner that is more reflective of a concept in the United States referred to as originalism. That theory can be summed up by the following three premises “[t]hat our society’s ‘master norm’ is democracy; that the Constitution gets its legitimacy solely from the majority will as expressed at the time of enactment; and that judicial decisions are less ‘democratic’ than those of the elected branches of government.”⁸²

⁷⁸ *Van der Peet*, *supra* note 4 at para. 60.

⁷⁹ See *ibid.* at para. 240 per McLachlin J. (as she was then known).

⁸⁰ Borrows, *supra* note 6 at 50.

⁸¹ See *Edwards v. Canada (A.G.)*, [1930] A.C. 124 at 136 (P.C.): “The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits.” See also *Hunter v. Southam* (1984), 11 D.L.R. (4th) 641 at 649 (S.C.C.) citing *Edwards*:

A constitution, ...is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.

⁸² Daniel A. Farber, “The Originalism Debate: A Guide for the Perplexed” (1989) 49 Ohio St. L.J. 1085 at 1098.

The Supreme Court of Canada may claim that it does not freeze Aboriginal or treaty rights in the past, but evidence to the contrary view is prevalent.

In *Powley* the Supreme Court accepted the findings of the Trial Judge that racism did play a part in the broken continuity⁸³ of the practices of the Métis. The Métis were forced underground and had to hide the fact that they were Métis:

We conclude that the evidence supports the trial judge's finding that the community's lack of visibility was explained and does not negate the existence of the contemporary community. There was never a lapse; the Métis community went underground, so to speak, but it continued. Moreover, as indicated below, the "continuity" requirement puts the focus on the continuing practices of members of the community, rather than more generally on the community itself.⁸⁴

The acceptance by McLachlin C.J.C. that racism played a role in breaking up the continuity of the historical Métis practices shows a willingness of the adjudicators to consider mitigating factors that may limit continuity requirements.

4.2.4 Other considerations in *Van der Peet*.

The Supreme Court in *Van der Peet* endorsed the principle that a right can not be incidental to other traditions or customs. "Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions."⁸⁵ Borrows contends that this assertion by the Supreme Court is without justification or precedence.⁸⁶ The Métis, however, can seize on this reasoning by showing that an incidental practice like commercial trade is integral to the

⁸³ See *R. v. Powley*, [1999] 1 C.N.L.R. 153, [1998] O.J. No. 5310 at para. 78 [*Powley* cited to O.J.] (Ont. Ct. Jus.) where Vaillancourt Prov. Ct. J. states:

The evidence at trial suggests that the visibility of the Métis at Sault Ste Marie waned after the treaty in 1850 and moved into the surrounding areas. The events at Red River in 1870 signaled a time when claiming Métis status was not advantageous. The Métis quietly became the 'forgotten people'.

See also the testimony given at para. 82 regarding the racism that some individuals faced being Métis.

⁸⁴ *Powley*, *supra* note 43 at para. 27.

⁸⁵ *Van der Peet*, *supra* note 4 at para. 70 per Lamer C.J.C.

⁸⁶ Borrows, *supra* note 6 at 51.

Métis culture. The barter practice that was common between Métis and First Nations and the commercialization of that practice with the Métis associations with the Hudson's Bay Company can act as a catalyst to establish commercial Aboriginal rights for the Métis.

Borrows further states, regarding First Nations Aboriginal rights, the reasoning in *Van der Peet* is in contradiction to previous jurisprudence established by the Supreme Court in *R. v. Simon*. "It should be clarified at this point that the right to hunt to be effective must embody those activities reasonably incidental to the act of hunting itself, an example for which is traveling with the requisite hunting equipment to the hunting grounds."⁸⁷ The Supreme Court in *Van der Peet* seemed to be willing to recognize the right itself, but unwilling to acknowledge the methods to exercise the right.⁸⁸ It is the paradoxical approach by the Lamer Court that can make the exercise of a right virtually impossible to implement without litigation.

A positive step that can be recognized from the reasoning in the *Van der Peet* analysis is that Aboriginal rights can be established without establishing a valid claim for title. Unlike the Australian's legal perspective of Native title, where no rights exist apart from an established claim of title, the Supreme Court in Canada recognizes and affirms that a right to exercise a practice, tradition or custom can occur on a piece of land separate from a claim of title. Aboriginal title is part of the Canadian doctrine of Aboriginal rights and this is affirmed when the Supreme Court held that "[a]boriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land."⁸⁹ The separation of

⁸⁷ *R. v. Simon*, [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153 (S.C.C.) at para. 31 per Dickson C.J.C. [*Simon* cited to S.C.R.].

⁸⁸ Borrows, *supra* note 6 at 51.

⁸⁹ *Van der Peet*, *supra* note 4 at para 74 per Lamer C.J.C.

the rights was recognized by the Supreme Court when it was stated that “[i]t follows that aboriginal rights can be incidental to aboriginal title but need not be; these rights are severable from and can exist independently of aboriginal title. As I have already noted elsewhere, the source of these rights is the historic occupation and use of ancestral lands by the natives.”⁹⁰ The importance of making Aboriginal title a subcategory of Aboriginal rights is that it provides a secondary claim for Aboriginal litigants that may not succeed in a claim of title.

From an Aboriginal perspective, however, it seems that the Supreme Court separates the roots from the tree by not seeing all Aboriginal rights together as a complete organism working in complex relationships between the earth and the tree. A different approach would not separate the two things – the earth and the tree. Like Aboriginal peoples, the trees are part of the earth and the earth is a part of the tree and together we

⁹⁰ *Ibid.* at para. 119 per Lamer C.J.C. See also para. 121 where he elaborates on the relationship of title and rights:

[a]boriginal right lands are those lands on which only specific aboriginal rights exist (e.g., the right to hunt for food, social and ceremonial purposes) because the occupation and use by the particular group of aboriginal people is too limited and, as a result, does not meet the criteria for the recognition, at common law, of aboriginal title. In these cases, the aboriginal rights on the land are restricted to residual portions of the aboriginal title - such as the rights to hunt, fish or trap - or to other matters not connected to land; they do not, therefore, entail the full sui generis proprietary right to occupy and use the land.

See also subsequent cases that dealt with the issue of Aboriginal rights without the establishment of Aboriginal title: *R. v. Adams*, [1996] 3 S.C.R. 101, [1996] 4 C.N.L.R. 1 (S.C.C.) at para. 26 [*Adams* cited to S.C.R.] per Lamer C.J.C.:

[w]hile claims to aboriginal title fall within the conceptual framework of aboriginal rights, aboriginal rights do not exist solely where a claim to aboriginal title has been made out. Where an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition.

See also *Côté*, *supra* note 68 at para. 38 where Lamer C.J.C. states:

I find that aboriginal rights may indeed exist independently of aboriginal title.... We wish to reiterate the fact that there is no a priori reason why the defining practices, customs and traditions of such societies and communities should be limited to those practices, customs and traditions which represent incidents of a continuous and historical occupation of a specific tract of land.

exist as one holistic being in a community of interconnected spirits.⁹¹ The legal system in Canada needs to properly understand that Aboriginal rights are tied to the peoples' historic traditions, which in turn are tied to the earth where everything is connected spiritually. Whatever approach the courts in Canada decide to take, the Métis can make strong arguments. If the Métis are forced to argue that the rights the Métis have are like First Nations' Aboriginal rights a strong case can be made; as well, if the Métis are forced to litigate based upon a Canadian understanding of Aboriginal rights that can be done successfully as well.

An issue like underlying title vesting in the Crown is an intangible concept to the Métis. The Crown believes that it can own the land no matter who may have an outstanding claim. The issue of underlying title is something that is foreign to First Nations' perspectives as so eloquently stated by Chief Seattle in his response to an offer from the American Government to buy land from his people: "How can you buy or sell the sky, the warmth of the land? The idea is strange to us. If we do not own the freshness of the air and sparkle of the water, how can you buy them?"⁹²

⁹¹ See Chief Seattle, *egan* note 104, where he spoke about the sacredness of the relationship of Indigenous people and the earth:

Every part of this earth is sacred to my people. Every shining pine needle, every sandy shore, every mist in the dark woods, every clearing and humming insect is holy in the memory and experience of my people. The sap which courses through the trees carries the memories of the red man. The white man's dead forget the country of their birth when they go to walk among the stars. Our dead never forget this beautiful earth, for it is the mother of the red man. We are part of the earth and it is part of us. The perfumed flowers are our sisters; the deer, the horse, the great eagle, these are our brothers. The rocky crests, the juices in the meadows, the body heat of the pony, and man--all belong to the same family.

⁹² "Chief Seattle," online: Seattle Speeches <<http://www.synaptic.bc.ca/ejournal/seattle.htm>> (as of November 28, 2005).

Ultimately, the ten step test created in *Van der Peet* created barriers to Aboriginal claimants seeking to have traditional rights recognized by the Canadian common law.⁹³

The implications of the ten point test are considered by Borrows:

The net effect of these ten considerations is to circumscribe Aboriginal rights and bring them more fully under the cultural assumptions of the common law. They establish non-Aboriginal characterizations of Aboriginality,⁹⁴ evidence,⁹⁵ and law⁹⁶ as the standards against which Aboriginal rights are measured. Taken together, these factors compel the conformity of Aboriginal rights to 'western' formulations of law in order to find recognition and affirmation in Canada's constitution. This creates problems for Aboriginal groups since these norms are generally not sensitive to the Aboriginal perspective on the meaning of the rights at stake and consequently constrain the reception of Aboriginal viewpoints.⁹⁷

The only Aboriginal viewpoints that the Supreme Court is willing to consider are the ones that are at peace with the Canadian legal consciousness.

⁹³ See also *Van der Peet*, *supra* note 4 where Lamer C.J.C. set out the ten step test for the Integral to a Distinctive Culture test (also referred to as the *Van der Peet* test) at paras. 48-74:

- 1) Courts must take into account the perspective of aboriginal peoples themselves....
- 2) Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right....
- 3) In order to be integral a practice, custom or tradition must be of central significance to the aboriginal society in question....
- 4) The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact....
- 5) Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims....
- 6) Claims to aboriginal rights must be adjudicated on a specific rather than general basis....
- 7) For a practice, custom or tradition to constitute an aboriginal right it must be of independent significance to the aboriginal culture in which it exists....
- 8) The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct...
- 9) The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence....
- 10) Courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples....

⁹⁴ For accounts of non-aboriginal views of aboriginality that are problematic see Ghislain Otis, "Opposing Aboriginality to Modernity: The Doctrine of Aboriginal Rights in Canada" (1997) 12 *British J. Canadian Stud.* 1, and Gillian Cowlshaw, "Did the Earth Move for You? The Anti-Mabo Debate" (1995) 6 *Australian J. Anthropology* 32.

⁹⁵ For commentary on non-aboriginal interpretations of aboriginal evidence, see Geoff Sherrott, "The Court's Treatment of the Evidence in *Delgamuukw v. B.C.*" (1992) 56 *Sask. L. Rev.* 441; Louis Assier-Andrieu, "Anthropology as the Eye of the Law: Comment on Canadian Jurisprudence" (1993) 33 *J. Legal Pluralism* 179; Marlee Kline, "The Colour of Law: Ideological Representations of First Nations in Legal Discourse" (1994) 3 *Social & Legal Stud.* 451.

⁹⁶ For a critique of the application of non-aboriginal characterizations of aboriginal law, see "Colonialism on Trial" in Don Monet and Sakau'u, eds., *Colonialism on trial: indigenous land rights and the Gitksan and Wet'suwet'en sovereignty case* (Philadelphia: New Society Publishers, 1992).

⁹⁷ Borrows, *supra* note 6 at 52.

In *Willison* and *Lavolette* the common law principles established from *Powley* were implemented. Lost in all of this is the Métis perspective. The Provincial courts may have agreed in both *Lavolette* and *Willison* that there were Métis rights that needed to be protected. The importance of these rights and traditions to the distinct culture of the Métis were secondary. Again as with *Powley*, *Lavolette*, and *Willison* we see a judge determining the scope of a right, the definition of what is a community and who she thinks belongs to that group. If the legal system in Canada would stop being so deliberately ignorant it could see that there are thousands of years of Aboriginal jurisprudence just waiting to be utilized; all the lawyers have to do is present the related parts to a judge that is willing to understand.

4.2.5 Duty of Consultation.

The duty to consult is a concept in place that the governments must fulfill if it is to apply a policy that will affect Aboriginal or treaty rights of the Métis people. The duty to consult is found through the concept of the honour of the Crown.⁹⁸ Generally, the honour of the Crown can be understood as “[i]ts dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably.”⁹⁹ The honour of the Crown can give rise to a fiduciary

⁹⁸ See *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* [2005], SCC 69, [2005] S.C.J. No. 71 at para. 4 [*Mikisew* cited to SCC]. See also *Badger*, *supra* note 56 at para. 41. See also *Marshall*, *supra* note 34.

⁹⁹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, [2004] S.C.J. No. 70 at para. 16 [*Haida* cited to S.C.R.].

duty¹⁰⁰ when specific aspects of control of an Aboriginal interest are held by the Crown.¹⁰¹ Fiduciary duty was first applied to Canadian Aboriginal law in *Guerin*.¹⁰²

In *Haida* the issue before the Supreme Court was whether there was a positive duty of the Crown and third parties to consult the Haida people before a finding of Aboriginal title or rights had been established in the courts.¹⁰³ The duty to consult is a requirement found through the *Sparrow* justification test.¹⁰⁴ It was held in *Sparrow* that there was a duty to consult with the west coast Salish people regarding an unresolved issue of an Aboriginal right to fish in conjunction with a federal fisheries law.¹⁰⁵ The duty to consult was expanded by the *Delgamuukw*¹⁰⁶ decision from a minimum requirement of consultation to the other extreme of outright consent by the First Nation in some situations.

¹⁰⁰ See *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79 at para. 81 where the court held that “[f]iduciary duty” as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. . . . overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests” [*Wewaykum* cited to S.C.R.].

¹⁰¹ See *ibid.* at para. 79.

¹⁰² See *Guerin v. R.* (1984), 13 D.L.R. (4th) 321 (S.C.C.), [1984] 2 S.C.R. 335, [*Guerin* cited to D.L.R.] at 322 per Dickson C.J.C., Beetz, Chouinard and Lamer JJ. concurring:

The Crown’s obligation towards the Indians was not a trust. However, the nature of the Indian title and the provisions of the *Indian Act*, R.S.C. 1952, c. 149, placed an equitable obligation or fiduciary duty on the Crown, enforceable by the courts, to deal with the land for the benefit of the Indians. The fiduciary relationship arose out of the aboriginal title of the Indians and the fact that the title was inalienable except upon surrender to the Crown.

¹⁰³ See *Powley*, *supra* note 43 at para. 18.

¹⁰⁴ See *Sparrow*, *supra* note 16.

¹⁰⁵ *Ibid.* at 1119. See also *R. v. Nikal*, [1996] 1 S.C.R. 1013, [1996] S.C.J. No. 47 [*Nikal* cited to S.C.R.] at para. 110 where Cory J. states: “So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement.” See also *Gladstone*, *supra* note 52 at para. 64.

¹⁰⁶ *Delgamuukw*, *supra* note 18 at para. 168 where Lamer C.J. expands the duty to consult:

The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

In citing Lamer C.J.C. from *Delgamuukw* regarding the expanded duty of consultation McLachlin C.J.C. in *Haida* stated: “These words apply as much to unresolved claims as to intrusions on settled claims.”¹⁰⁷ This is an important statement from the Supreme Court because it was the first time the Supreme Court held that there was a positive duty to consult even if there was not an established Aboriginal right or title:

Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be *determined, recognized and respected*. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.¹⁰⁸ [added emphasis]

The language that the Chief Justice utilizes in this quotation provides a glimmer of hope in the protection of Aboriginal rights. Most notably the word “respected” stands out as a possibility that Aboriginal rights, in the hands of the Supreme Court, may have a life in the future for protection under the Canadian Constitution.

Mikisew, a 2005 case, provides an example where the duty to consult required direct contact with the First Nation that was affected by a governmental decision. The Crown set out to build a road that would be detrimental to the hunting practices of the First Nation that is located within Wood Buffalo National Park. It was held that general public consultation was not considered to be adequate consultation with the First Nation.¹⁰⁹ The Canadian Government contended that Treaty 8 made allowances for the Crown to take up land from time to time for settlement and other purposes. The Supreme Court said that the duty to consult in this situation required the Crown to speak directly

¹⁰⁷ *Haida*, *supra* note 99 at para. 24.

¹⁰⁸ *Ibid.* at para. 25 per McLachlin C.J.C.

¹⁰⁹ See *Mikisew*, *supra* note 98 at para. 64.

with the treaty members that were affected by the proposed road. The honour of the Crown was at stake and it had failed to meet its duty to properly consult the Mikisew people.

This approach by the Supreme Court embraced a positivist approach of applying the common law principles established in previous cases. Rather than creating law, based on protectionist attitudes towards colonial state interests by limiting the scope of Aboriginal or treaty rights, McLachlin C.J.C. in *Haida* and Binnie J. in *Mikisew* applied principles.

The hope that exists is that potential rights now must be considered by the Crown before undertaking activities that may infringe Aboriginal or treaty rights. That consideration leads to a duty to consult the Aboriginal group before litigation has made its way through the judicial process:

[D]epending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.¹¹⁰

The Crown, however, contended in *Haida* that it was under no duty to consult until a right had been established¹¹¹ and in *Mikisew* the Crown argued that it had met the threshold for consultation.¹¹²

In both cases it was argued that prior to the establishment of a right there is only a general duty of fairness that applies to unproven rights. The Crown relied on administrative law as a defense in denying that consultation must occur before the

¹¹⁰ *Ibid.* at para. 27.

¹¹¹ *Haida*, *supra* note 99 at para. 28.

¹¹² See *Mikisew*, *supra* note 98 at para. 13.

establishment of a right.¹¹³ Secondly, the Crown referred to the *TransCanada Pipelines Ltd. v. Beardmore (Township)* case from the Ontario Court of Appeal where it was held that “[w]hat triggers a consideration of the Crown’s duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1) ...”¹¹⁴ These arguments by the Crown were rejected by the Supreme Court.

The Chief Justice referred to the concept of reconciliation in the context of consultation of Aboriginal peoples. The reasoning behind the purpose of consultation is found in the case of *Mitchell v. M.N.R.* where it was held that “[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation . . .”¹¹⁵ McLachlin C.J.C. followed the ideology of trying to treat Aboriginal peoples fairly. Rules were not created as they were in the *Van der Peet* case; rather, rules were applied and given meaning to protect the interests of the Haida and the Mikisew peoples – there is a duty to consult when there is the potential for Aboriginal or treaty rights to be interfered with whether or not the right has been proven in a court.

It appears that McLachlin C.J.C. embraced the liberal and generous approach to interpreting Aboriginal rights when she held: “To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the ‘meaningful content’ mandated by the ‘solemn commitment’ made by the Crown in recognizing and

¹¹³ See *Haida*, *supra* note 99 where the crown refers to administrative law cases that support its position: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, [1985] S.C.J. No. 78 at 653 [*Cardinal* cited to S.C.R.]; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 at para. 20 [*Baker* cited to S.C.R.].

¹¹⁴ *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403 (Ont. Ct. App.), [2000] 3 C.N.L.R. 153 at para. 120 [*TransCanada* cited to D.L.R.].

¹¹⁵ *Mitchell*, *supra* note 10 at para. 9.

affirming Aboriginal rights and title.”¹¹⁶ This statement can be seen as a liberal interpretation because the Supreme Court was not seeking to ignore potential interference with rights. The Supreme Court sought to protect rights that have not been established in order to protect the means of the right before it may be destroyed by industry or other activities by government.¹¹⁷

The possibility of recognizing a claimed right before it has been established in a legal sense can open the door to negotiation.¹¹⁸ Aboriginal peoples now have some leverage with the recognition of potential rights on their side. Although the door is opened to negotiation, the Supreme Court warned that consent is not necessarily required:

[T]here is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown’s reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached....¹¹⁹

If there is no necessity to acquire the consent of the Aboriginal group, however, this could be seen as undermining the whole process of consultation. It must be asked why have a duty to consult when it is merely an exercise in administrative procedure?

The Supreme Court did recognize that the duty to consult must be meaningful,¹²⁰ but the Court placed limits on what Aboriginal peoples can expect when negotiating with the Crown:

This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal ‘consent’ spoken of in *Delgamuukw* is appropriate only in

¹¹⁶ *Haida*, *supra* note 99 at para. 33 per McLachlin C.J.C.

¹¹⁷ *Ibid.*

¹¹⁸ See *ibid.* where McLachlin C.J.C. stated: “It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation.”

¹¹⁹ *Ibid.* at para. 42. As referred to by the Supreme Court see also: *Halfway River First Nation v. British Columbia (Minister of Forests)*, [1999] 4 C.N.L.R. 1, [1999] BCCA 470 at 44 [*Halfway River* cited to C.N.L.R.]; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107, [2003] BCSC 1422.

¹²⁰ *Haida*, *supra* note 99 at para. 46 where it is stated: “Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations.”

cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.¹²¹

Although, the requirement of the Crown to consult prior to the establishment of a right is positive, Aboriginal peoples involved in the negotiation must reconcile their interests and traditional control of their lands with the intentions of the Crown. As Professor Henderson writes, to properly reconcile the interests of the Crown and Aboriginal peoples. Aboriginal jurisprudence must be considered:

The Canadian judiciary must break free of the constructed Eurocentric image of Aboriginal societies to learn Aboriginal jurisprudences and how they inform Aboriginal rights. Aboriginal jurisprudences are integral to each aspect of authentic legal analysis of Aboriginal rights. To take full account of them, the judiciary needs the consensual authority of the Aboriginal peoples and the benefit of the teachings, of their Elders and law-keepers. With such authority and such teachings, courts will be in a position properly to identify, define, interpret, and give meaningful context to Aboriginal rights, to reconcile such rights with the Canadian legal order in a fair and just way that shows them proper respect, and to tell when external limitations on such rights can legitimately be justified.¹²²

By recognizing Aboriginal jurisprudence during negotiations or cases before the Supreme Court true reconciliation can begin. The legal system, by showing the same respect that Aboriginal peoples have shown for the colonial legal system, can improve dramatically and welcome a third type of law into the Canadian legal system – Indigenous/Aboriginal law (with the other two legal systems being the common law and civil law).

The second question presented to the Supreme Court in *Haida* asked whether there is a positive duty to consult by third parties. The Supreme Court held that the duty to consult resides in the Crown and cannot be delegated.¹²³ It was reasoned that the Crown's duty arises from the "[a]ssumption of sovereignty over lands and resources formerly held by the Aboriginal group."¹²⁴ It is noted by the court that:

¹²¹ *Ibid.* at para 48 per McLachlin C.J.C.

¹²² Henderson, *supra* note 3 at 77.

¹²³ *Haida*, *supra* note 99 at para. 53.

¹²⁴ *Ibid.*

The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable.¹²⁵

Although, a third party may be held liable for various breaches, ultimately third parties “[c]annot be held liable for failing to discharge the Crown’s duty to consult and accommodate.”¹²⁶ It can be argued that the Supreme Court was seeking to protect the interests of business over those of Aboriginal peoples. It seems that there should be a higher duty placed on business as a constructive trustee as was held in the lower court decision because of the potential damage that industry can do (has done and continues to do) to the environment.¹²⁷

In the *Lavolette* and *Willison* cases the duty to consult was not applied. The legislation regarding Métis hunting and fishing rights was in place and the governments should have reasonably known that the *Powley* decision would require provincial laws to be amended to accommodate the hunting rights of the Métis. Instead of embracing the principles of negotiation and fair dealing, the governments of British Columbia and Saskatchewan opted for litigation.

It can also be argued that the provincial governments are not following the rules established by the Supreme Court. First, to recognize Métis hunting rights and second, to

¹²⁵ *Ibid.* at para. 56.

¹²⁶ *Ibid.*

¹²⁷ See *Haida Nation v. British Columbia (Minister of Forests)*, [2002] BCCA 462, [2002] B.C.J. No. 1882 [*Haida* cited to BCCA] at para. 65 where Lambert J.A. held that:

Weyerhaeuser was a constructive trustee because the company was in knowing receipt of the possibility of an Aboriginal title claim: But, what is even more important, the breach by the Crown of its fiduciary duty, which was known to MacMillan Bloedel and to Weyerhaeuser or which should have been known to MacMillan Bloedel and Weyerhaeuser, (or with respect to which Weyerhaeuser should have made an inquiry about whether the Crown had complied with the Crown's fiduciary duty, though no inquiry can have been made by Weyerhaeuser), places this case within the category of ‘knowing receipt’ cases where the title, if any, that is passed to the third party, in breach of the fiduciary duty, is clogged by the fiduciary’s breach of duty, so that the third party is itself a constructive trustee and, in that capacity, owes a trust or fiduciary duty to the original beneficiary of the original fiduciary obligation.

enter into meaningful negotiation/consultation with the Métis. The duty to consult includes both potential and existing Métis rights. Métis practices existed prior to the assertion of sovereignty or effective control in *Lavolette* and *Willison*. After *Powley* and *Haida* a duty to consult resides in the Crown to determine the potential, actual, and incidental rights of the Métis before harmful action can be undertaken. Yet, the Métis are forced to reconcile their practices into the framework of the Canadian legal consciousness rather than the Canadian legal system adjusting itself to recognize the constitutional pre-existing rights of the Métis to hunt on their territories.

4.3 Ideological Principles of Adjudication.

The reasoning of Lamer C.J.C. showed that there is a protectionist attitude toward the ideological perspective that Aboriginal rights must be reconciled with the Crown. The analysis of the *Van der Peet* decision not only detracted from finding a balance between the colonial system of law and the Aboriginal perspective, but it also forced the Aboriginal conceptions to be molded into a shape that fit into the Canadian context of the Canadian doctrine of Aboriginal rights. This can also be seen in *Haida* when the duty to consult does not necessarily require the consent of Aboriginal people.

The interests that are being put forward by Aboriginal groups are not arguments motivated by self-interest. Aboriginal peoples seek to protect their historic rights from their sovereign communities, the rights of their children and grandchildren. It is a commonly accepted principle among Aboriginal peoples that they make decisions with regard to the seven generations that will live after them,¹²⁸ which reaches beyond issues

¹²⁸ See Pamela D. Palmater “Forum on R. v. Marshall: An Empty Shell of a Treaty Promise: R. v. Marshall and the Rights of Non-Status Indians” (2000) 23 Dalhousie L.J. 102 at 116-117 where she states: “Certainly Aboriginal people owe their children seven generations into the future a fighting chance to maintain not only their Aboriginal and treaty rights, but their very existence.” See also Canada, *Report of*

of self-preservation of the Supreme Court and the Parliament of Canada. The establishment or the potential of an existing Aboriginal or treaty rights claim should be enough to protect them from encroachment by private interests or government action. Aboriginal peoples should be the only people defining Aboriginal or treaty rights.

It is not a secret that the Supreme Court has no interest in creating or abridging traditional Aboriginal perspectives that do not adhere to the principles of the Canadian common law.¹²⁹ With a protectionist approach from the judiciary regarding the Canadian Constitution, the Supreme Court has an inherent need to frame Aboriginal rights within the box of section 35.¹³⁰ If true reconciliation were to be achieved, it should be the government that should change its laws for peoples that have been in the possession of the land since time immemorial.¹³¹ The duty to consult should be based on the *full consent* of the Aboriginal peoples involved. And the Supreme Court needs to bring hope back to the desolation that exists in the use of s. 35 against Aboriginal peoples.

the Royal Commission on Aboriginal Peoples (Ottawa: Canada Communication Group, 1996) (Co-chairs: R. Dussault & G. Erasmus). Hundreds of research reports and testimony from over two thousand witnesses are preserved on CD-ROM: See *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Libraxus, 1997).

¹²⁹ See *Van der Peet*, *supra* note 4 at para. 31 where Lamer C.J. states:

More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

¹³⁰ Henderson, *supra* note 1 at 1005 where Henderson states: "In *Van der Peet*, the Chief Justice concluded that the particularity of Aboriginal practices dictates a case-by-case approach to determining the contents of the constitutional box of existing aboriginal rights."

¹³¹ See *Calder*, *supra* note 10 at 375 where Hall J. states that the Nishga's land had "[b]een in their possession from time immemorial."

4.3.1 General Idea of Aboriginal Rights.

It should be asked if framing traditional Aboriginal rights into Canadian law is the best way to find reconciliation.¹³² The Aboriginal rights that the Supreme Court is asked to address are sustained by the legal system based on its constitutional stature. Ultimately, as Henderson states “[t]he Lamer Court’s naive imperialism betrays the efforts of the Dickson Court to bring a degree of accountability and self-restraint to Crown dealings with Aboriginal nations”¹³³ and leaves Aboriginal peoples to modify their claims in an alien legal system’s context. The McLachlin Court, however, seemed to be embracing a more liberal approach in protecting the inherent rights of Aboriginal peoples by ensuring that there is at least adequate consultation of Aboriginal peoples if there is a realistic possibility of encroachment of potential rights. It would seem that Dickson C.J.C. had planted the seeds of hope only to have them plowed under by the naivety of Lamer C.J.C.

The Supreme Court recognizes that Aboriginal law has emerged from the divergence of two cultures.¹³⁴ The Métis are the paradigm of this merger and the existence of their rights reflect this convergence. The alternative approach in recognizing Aboriginal rights would be to recognize Aboriginal law in the Canadian common law. This recognition would see the traditional rights directly incorporated into the common law without judicial modification or interpretation. Professor Henderson refers to this as

¹³² *Van der Peet*, *supra* note 4 at para. 49.

¹³³ Henderson, *supra* note 1 at 1002.

¹³⁴ See *Van der Peet*, *supra* note 4 at para. 42. See also Brian Slattery, “The Legal Basis of Aboriginal Title,” in *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*. Frank Cassidy, ed. (Lantzville, B.C.: Oolichan Books, 1992) at 120-21 where Slattery states that Aboriginal law is “[n]either English nor aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities.”

recognizing “the *lex loci*¹³⁵ of a territory at the moment of its conquest or annexation to the Crown.”¹³⁶

It has been acknowledged by the Supreme Court that there has been a failure to adequately address the *sui generis*¹³⁷ nature of Aboriginal and treaty rights. This type of approach would have traditional laws of Aboriginal peoples truly protected by the Constitution. Professor Henderson states that “[s]ection 35(1) is a choice-of-law rule. Moreover, under section 52 of the *Constitution Act, 1982*, this choice-of-law rule has become part of ‘the supreme law of Canada’ and overrides any ordinary legislation inconsistent with it.”¹³⁸ The Canadian legal traditions of the civil and common law has not followed its historical rules of Aboriginal rights found through the Imperial British legal system and has failed to nurture those relationships and Aboriginal peoples are left with barren promises of protection.

Professor Henderson argues that the Canadian legal system, instead of remaining consistent with the principles established from the pre-existing systems of Canadian law (*i.e.* British Imperial law),¹³⁹ has moved to the adjudicative creation of a new formulation of Aboriginal law in a Canadian context:

¹³⁵ *Black’s Law Dictionary*, 7th ed., Bryan A. Garner ed. (St. Paul, Minn.: West Group, 1999) at 923 *s.v.* *lex loci*: “the law of the place; local in.”

¹³⁶ *Henderson, supra* note 1 at 1007. See also *Re Southern Rhodesia*, [1919] A.C. 211 at 233, affirmed and interpreted in *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399, 90 L.J.P.C. 236 at 407 [*Amodu Tijani* cited to A.C.], and *Oyekan v. Adele*, [1957] 2 All E.R. 785 at 788. A similar principle is found in articles 4, 5 and 8 of the *Convention on Indigenous and Tribal Peoples*, 27 June 1989, 28 I.L.M. 1382, and ratified thus far by seven states: Canada is not among them.

¹³⁷ *Black’s Law Dictionary, supra* note 135 at 1448 *s.v.* *sui generis*: “Of its own class; unique or peculiar.”

¹³⁸ *Henderson, supra* note 1 at 1007.

¹³⁹ For example see the Old English case that addresses the land rights of the Scots in relation to the rights of the English Crown. *The Case of Tanistry* (96) (1608) Davis 28 (80 ER 516); 4th ed. Dublin (1762) English translation 78 at 110-111 where is stated that:

[a] royal monarch (who) hath made a new conquest of a realm, although in fact he hath the lordship paramount of all the lands within such realm, so that these are all held of him, mediate vel immediate, and he hath also the possession of all the lands which he willeth actually to seise and retain in his own hands for his profit or pleasure, and may also by his grants distribute such

Rather than deferring to First Nations' laws, however, the Supreme Court in *Van der Peet* has assumed authority to determine from extrinsic evidence -- and centuries after the fact -- what made each Aboriginal society what it was. By this means, the Court has discarded the traditional British Commonwealth framework, whereby Aboriginal peoples retained the rights defined by their own laws (unless subsequently extinguished by Parliament), replacing it with a doctrine of ex post facto judicial extinguishment.¹⁴⁰

One can see that the Supreme Court has moved away from attempting to truly reconcile rights of First Nations people with the Canadian legal system in *Van der Peet*. It has however, made a renewed effort in *Haida* to find true reconciliation of the pre-existing rights of Aboriginal peoples. The Supreme Court, in the post-Dickson era, moved from balancing rights with the *Charter of Rights and Freedoms* and s. 35 where "[a] core of shared rights and values was supposed to bind Canadians together and inoculate them against the centrifugal forces of language and, secondarily, the bitter legacy of colonialism,"¹⁴¹ to an era symbolized by the Lamer Court that "[h]as shown First Nations that section 35(1) is not an iron shield but a rope of sand."¹⁴² The general idea of the rights from Lamer C.J.C. was defined on how well the rights do or do not fit into the Canadian common law. The McLachlin Court has acknowledged that the rights of Aboriginal peoples in Canada must be dealt with honourably.¹⁴³

Rights both exist and are threatened by their treatment in the Supreme Court. The rights do exist, not because the rights were 'given' to Aboriginal peoples, rather, it is because the rights entrenched in s. 35 recognize the existence of prior legal systems and occupation of land before the arrival of Europeans:

portions as he pleaseth ... yet ... if such conqueror receiveth any of the natives or antient inhabitants into his protection and avoweth them for his subjects, and permitteth them to continue their possessions and to remain in his peace and allegiance, their heirs shall be adjudged in by good title without grant or confirmation of the conqueror, and shall enjoy their lands according to the rules of the law which the conqueror hath allowed or established, if they will submit themselves to it, and hold their lands according to the rules of it, and not otherwise.

¹⁴⁰ *Sparrow*, *supra* note 16 at 1008-1009.

¹⁴¹ *Ibid.* at 1009.

¹⁴² *Ibid.*

¹⁴³ See *Haida*, *supra* note 99.

[t]he doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.¹⁴⁴

While Aboriginal rights may be recognized within the Canadian Constitution, Aboriginal rights were not created by a Canadian act or statute. Métis and Aboriginal rights existed before Canada and will continue to exist whether or not the Supreme Court chooses to acknowledge that fact.

Whether the Supreme Court Justice was Dickson, Lamer or McLachlin the same problems remain for Aboriginal peoples when they enter into the Canadian court room. The Supreme Court's approach to s. 35 is as though no Aboriginal person had a right to hunt, fish or trap before s. 35 was inserted into the Constitution. It should be remembered that an Aboriginal person does not need government or Constitutional recognition to exercise one's rights from the past. The rights of the Métis existed before s. 35 and would exist without that section of the Constitution. The source of the rights is found in the existence of Aboriginal beliefs, customs and government structures that protect the interests of the people. The practices of the past become rights in the Canadian legal consciousness once it can be shown that the right will not adversely affect the *status quo* of the Canadian state's authority.

If an Aboriginal person wanted to exercise a right from the past that has not been recognized by the Canadian legal system one must break Canadian law. After the

¹⁴⁴ *Van der Peet*, *supra* note 4 at para. 30 per Lamer C.J.C. Also see *Roberts v. Canada*, [1989] 1 S.C.R. 322, [1989] S.C.J. No. 16 [*Van der Peet* cited to S.C.R.] at 340 where the Supreme Court unanimously held that: "...[a]boriginal title pre-dated colonization by the British and survived British claims of sovereignty." See also *Delgamuukw*, *supra* note 18 at paras. 114, 126, 134, and 144-145, per Lamer C.J.C. See also Douglas Sanders, "Pre-Existing Rights: The Aboriginal Peoples of Canada", in Gérald-A. Beaudoin and Ed Ratushny, eds., *The Canadian Charter of Rights and Freedoms* (2nd ed. 1989) at 731-32.

Canadian law has been defied the accused then must go to a Canadian Court and prove why one has the right to do what his ancestors did before the arrival of Europeans or the assumption of sovereignty. This logic is simply baffling when one understands that laws of the sovereign Aboriginal nations have always been in place in their communities. It is troubling that those historic rights are not recognized by a Government that has assumed sovereignty – not proven it.¹⁴⁵ From this, the Métis are forced to hunt in the Canadian legal consciousness for the rights that protect their traditions and culture.

The rights found in s. 35 are threatened by the Canadian Courts. Judges will have engage in considerations of legal arguments of Aboriginal control or jurisdiction of land.¹⁴⁶ The Supreme Court can not separate itself from allegiance to the Canadian state; to do so would require a judge to question the authority and jurisdiction of the judge to rule over Aboriginal peoples in a Canadian court. There is no separation from the allegiance to the state for judges and the legitimacy of an asserted Aboriginal right.

If there was a separation between the judiciary and the state, judges could create a doctrine that would recognize the inherent traditional laws of Aboriginal societies without filtering a definition of a right through the Canadian common law. What are Aboriginal litigants left with? Are Aboriginal peoples to turn to bureaucratic provincial or regional First Nation or Métis organizations? What can be done to ease the conscience

¹⁴⁵ See *Sparrow*, *supra*, note 16 at para. 49 where Dickson C.J.C. states:

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown;...

For a further discussion on the assumption of sovereignty by the Crown see Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective" in Micheal Asch ed. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*. (Vancouver: UBC Press, 1997).

¹⁴⁶ See *Delgamuukw*, *supra* note 27.

of the Canadian state and assist it in moving towards the unimpeded protection of Aboriginal and treaty rights?

4.3.2 The Métis: distinct societies and people with distinct rights.

The Métis are recognized as being distinct peoples by the Supreme Court,¹⁴⁷ other Aboriginal people,¹⁴⁸ Europeans,¹⁴⁹ in the Canadian Constitution in s. 35, and by Provincial Governments.¹⁵⁰ This recognition comes from the fact that the Métis are not First Nations and not European. As the *RCAP* report states: “The Métis developed separate and distinct identities, not reducible to the mere fact of their mixed ancestry: ‘What distinguishes Métis people from everyone else is that they associate themselves with a culture that is distinctly Métis.’”¹⁵¹ The perception of Métis people as being distinct is reflected in the fact of the various ways that they are recognized through law and culture.

The Métis are not located in any specific region nor are they descended from one particular territory of Canada. The Métis homeland could be identified as being generally

¹⁴⁷ See *Powley*, *supra* note 43 at para. 10.

The term ‘Métis’ in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears.

See also at para. 11:

[p]articularly given the vast territory of what is now Canada, we should not be surprised to find that different groups of Métis exhibit their own distinctive traits and traditions. This diversity among groups of Métis may enable us to speak of Métis ‘peoples’, a possibility left open by the language of s. 35(2), which speaks of the ‘Indian, Inuit and Métis peoples of Canada.’

¹⁴⁸ See *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa, Royal Commission on Aboriginal Peoples: 1996) vol. 4 at 200 [*RCAP*] where it is stated: “The Cree people expressed the Métis character in the term Otepayemsuak, meaning the ‘independent ones’.”

¹⁴⁹ See *ibid.* The French referred to the fur trade Métis as *coureurs de bois* (forest runners) and *bois brûlés* (burnt-wood people) in recognition of their wilderness occupations and their dark complexions.

¹⁵⁰ See *The Métis Act*, S.S. 2001, c. M-14.01. See also *The Métis Settlements Act*, R.S.A. 2000, c. M-14.

¹⁵¹ *RCAP*, *supra*, at 202.

west central North America,¹⁵² but there are many distinct Métis societies across Canada. Some of these have connections with the Red River Settlements and some do not. Nonetheless, there are Métis all across Canada in virtually every province and territory. To distinguish between Métis people that are from Red River and from those that are not is based on a colonial attitude of classification, separation and possibly racism.

The intermingling of the blood between Aboriginal people and Europeans created a people with a distinct language, culture and lifestyle. The Michif language is a combination of Cree and French. The culture of the Métis developed from their participation in the fur trade, the resources related to that economy.¹⁵³ Like the spiritual significance of the 12 tipi poles to First Nations, the Métis have the Red River Cart Wheel where the spokes of the wheel represent values that should be followed in healing.¹⁵⁴

The Métis flag also represents the beginning of a new and distinct people. The infinity sign with the sky blue background suggests the hope that the Métis culture will live forever. As well, it also represents the birth of a new culture with the intermingling of European and First Nations people.¹⁵⁵ The Métis jig was and still plays a significant

¹⁵²See Jean Teillet, Who are the Métis?" online: Métis Provincial Council of British Columbia <http://www.mpcbc.ca/files/who_are_the_metis.doc> (as of December 5, 2005). See also *RCAP infra*, online vol. 5 where it is stated:

[t]he homeland of the Métis Nation embraces the three prairie provinces as well as parts of Ontario, the Northwest Territories, British Columbia, and the north central United States.... Other Métis communities are found in Quebec, Ontario, Nova Scotia, New Brunswick, British Columbia and the North.

¹⁵³ See "Métis Perspectives," online: *RCAP* vol. 5 <http://www.ainc-inac.gc.ca/ch/rcap/sg/cj5_e.pdf> (accessed December 5, 2005).

¹⁵⁴ See "The Red River Cart," online: Métis Commission <<http://www.metiscommission.com/history.htm>> (as of December 6, 2005) where the significance of the Healing Cart Wheel is outlined by defining what the twelve spokes represent: "1) Trust Based; 2) Empowering 3) Committed; 4) Culturally Reinforcing; 5) Safe; 6) Respectful; 7) Dignified; 8) Accessible; 9) Peer Supportive; 10) Ethical; 11) Family – Centred; 12) Confidential." The outer rim of the wheel represents the community and the hub represents the individual.

¹⁵⁵ See "An infinity symbol on blue," online: CRW Flags <http://www.crwflags.com/fotw/flags/ca_metis.html> (as of December 6, 2005).

role in the celebrations of Métis culture. The Métis sash is another symbol of the distinct culture. The sash was traditionally used as a scarf, to secure heavy loads to their bodies for transport or to hold coats closed. The colours of the sash each represent something particular to the Métis: “Red, which is the historical depicted colour for the Métis Sash; Blue & White symbolizing the colours of the Metis Nation flag; Green signifying fertility, growth and prosperity and; Black, symbolizing the dark period in which the Métis people had to endure dispossession and repression.”¹⁵⁶ These are a few examples of the things that separate Métis culture from their First Nations relatives.

The lifestyle of the Métis was based around the fur trade and the work involved in that vocation. This work involved constant trading, linguistic skills and labour to be a productive part of the fur trade economy. When the Métis started to shape the landscape in Green Lake, Meadow Lake and other parts of Northern Saskatchewan around the 1800s a distinct society of Métis people began to evolve. Some of the Métis in Meadow Lake and Green Lake were related to people in Red River and some were not. The climate of the north mandated that certain parts of their lifestyle be adapted to their environment. Hunting for the woods buffalo was different than hunting for buffalo on the plains. The river systems of the north presented their specific challenges to the Métis, but at the same time the rivers and lakes became transportation systems for the Métis traders.

The settlement of Green Lake and Meadow Lake was due in large part to the Métis that participated in the fur trade with the Northwest Company and the Hudson’s Bay Company. The Métis were secluded in the northern parts of Saskatchewan going

¹⁵⁶ “The Métis Sash,” online: Métis Resource Centre
<<http://www.metisresourcecentre.mb.ca/history/sash.htm>> (as of December, 6, 2005).

between First Nations communities and the trading posts. There was contact with other Métis communities in the south, but the unique circumstances of the north created a distinct society of Métis that belong to the Métis Nation.

The connection to Red River and other Métis communities brought the sense of Métis Nationalism to life. An identity was born from these connections, but it was an identity that was composed of many complex relationships, traditions and activities. From this common identity the Métis Nation began to take shape in the form of government structures and institutions.

The source of Métis rights can be directly tied to the implementation of governing the interactions between Métis communities and people. With the shift of the level of participation of the Métis in the fur trade either as hunters or traders, they became more reliant on hunting, fishing and trapping for their direct sustenance. As shown in the first chapter, the lives of the Métis began to resemble those of the Cree in the area and demonstrable of the resilience of the Métis to adapt between cultures.

The source of Métis hunting rights takes shape from their participation in the fur trade and their need to hunt for sustenance prior to the existence of a Canadian state. Both of these were practices that predated the assertion of control over the Northern parts of Saskatchewan. What we are concerned with here is the fact that hunting had become a way of life and the only way to survive in some cases in both British Columbia and Saskatchewan. The source of the right to hunt does not come from the goodwill of the government under s. 35 of the Constitution; rather, it comes from the Métis communities themselves with the people exercising the hunt.

What does the future hold for the Métis and their rights? Possible claims of commercial trade as it was a practice that was a part of Métis culture that predates the assertion of effective control or sovereignty by Canada. This issue may be argued from the premise that Métis rights are inherent rights that can not be affected by constitutional documents like the *Natural Resources Transfer Agreement*,¹⁵⁷ which supposedly unilaterally altered commercial treaty rights in the Prairie Provinces. Métis claims to Aboriginal title will also be a consideration that the legal system will have to consider.

As was contended in *Blais*, the Treaty Commissioner made promises to “[t]he Chiefs of the various bands, that they dealt with, that the ‘half-breeds’ connected with those treaties would be ‘treated fairly and justly.’”¹⁵⁸ It can be argued that requests made by Chiefs¹⁵⁹ regarding Métis having land and rights, and assurances made by Alexander Morris to the Chiefs during treaty negotiations, are unfulfilled treaty promises.¹⁶⁰

¹⁵⁷ *Constitution Act, 1930*, 20 & 21 Geo V, c.26 (U.K.), Schedule (1) Manitoba, Para. 13; Schedule (2), Alberta, Para. 12; Schedule (3), Saskatchewan, Para. 12:

In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

See also *R. v. Horseman*, [1990] 3 C.N.L.R. 95, [1990] 1 S.C.R. 901 for a judicial discussion on the unilateral modification to treaty rights by the *Constitution Act, 1930*.

¹⁵⁸ *R. v. Blais*, [1997] 3 C.N.L.R. 109, [1996] M.J. No. 391 at 119 [cited to C.N.L.R.] See also Half-Breed Adhesion to Treaty 3, 12 September 1875. See also Catherine Bell, “Métis Constitution Rights in Section 35(1)” 1997 36 Alberta L. Rev. 180 and Catherine Bell and Karen Buss, “The Promise of Marshall on the Prairies: A Framework for Analyzing Unfulfilled Treaty Promises,” 2000 63 Sask. L. Rev. 667.

¹⁵⁹ See Alexander Morris, “The Treaties of Canada with the Indians of Manitoba the Northwest Territories, and Kee-wa-tin” (Toronto: Willing & Williamson, 1880) at 16 where Morris comments about William B. Robinson’s negotiations and the Chiefs requests for the Métis that were made to Robinson: “The relations of the Indians and half-breeds, have long been cordial; and in the negotiations as to these initial treaties, as in the subsequent ones, the claims of the -half-breeds, to recognition, was urged by the Indians.” See also at 69 where Morris recorded a statement by a Chief during the negotiations of Treaty 3:

CHIEF- ‘I should not feel happy if I was not to mess with some of my children that are around me-those children that we call the Half-breed-those that have been born of our women of Indian blood. We wish that they should be counted with us, and have their share of what you have promised. We wish you to accept our demands. It is the Half-breeds that are actually living amongst us-those that are married to our women.’

¹⁶⁰ *Ibid.* at 294-295:

Further cases around hunting and fishing rights will also continue as the case-by-case approach will continue to be embraced by the courts in Canada. The Métis will have to also consider that they should have the right to determine who hunts in their traditional territory and not the government. The trap that *Powley* has set for the Métis people must be recognized and dismantled. The Métis should be able to approach the leaders of other Métis or First Nations communities for permission to hunt in their territories. Governments will have to be challenged on their imposition of community specific/regional hunting rights. The Métis will need to come up with solid definitions of community, citizenship, and possible conservation mechanisms in order to stop the courts from deciding these issues. The Métis do not need the Supreme Court to settle these issues if they can find the leadership with the vision that is required to maintain their identity, sovereignty and historic rights.

I refer to the wandering Half-breeds of the plains, who are chiefly of French descent and the life of the Indians...there is a large class of Métis who live by the hunt of the buffalo, and have no settled homes. I think that I would not be disposed to recommend their being brought under the treaties, I would suggest that land should be assigned to them, and that on their settling down...some assistance should be given to them to enable them to enter upon agricultural operations.

See also at 83 where Morris recorded the requests of the Chiefs at the signing of Treaty 3 regarding the Métis:

The Chiefs then agreed to accept the terms offered and to sign the treaty, having first asked that the Half-breeds should be allowed to hunt, and having been assured that the population in the South-West would be treated fairly and justly, the treaty was signed by the Commissioners and the Chiefs, having been first fully explained to them by the interpreter.

See also at 99 where Morris promises that Métis will be dealt with justly:

At the Lake of the Woods last winter every Half-Breed who was there with me was helping me, and I was proud of it, and glad to take the word back to the Queen, and her servants, and you may rest easy, you may leave the Half-breeds in the hands of the Queen who will deal generously and justly with them.

See also at 186-187 where Chief Mistowasis made a specific request to allow the Métis that wanted to stay on the land in the Treaty 6:

Mist-owas-is then wanted to speak for the Half-breeds, who wish to live on the reserves. I explained the distinction between the Half-breed people and the Indian. Half-breeds who lived amongst the Indians as Indians, and said the Commissioners would consider the case of each of these last on its merits.

See also where Chief Red Pheasant requested that Métis claims be respected at 193: "He wished the claims of the Half-breeds who had settled there before the Government came to be respected..."

4.4 Theoretical Conclusion.

It must be asked how a court will reconcile Métis rights with Canadian law. Protections for the constitutional rights of the Métis have been established in law. This protection should be seen as a positive move by the Canadian Government to protect the interests of the Métis in Canada. It must be remembered that s. 35 did not give any rights to the Métis; rather, it recognized pre-existing legal structures that were in place before the Canadian legal order gained consciousness.

Aboriginal rights of the Métis, however, have been undefined by legislation and they can not be defined without the consent of the Métis. The Supreme Court has affirmed that fact. Yet, if the Supreme Court has to turn to the Elders of the Métis communities a definition of their jurisprudence could be found. The Supreme Court can limit the interference of governments to Métis rights by invoking the honour of the Crown and imposing the protection of Métis rights through Canada's fiduciary responsibilities. The rights that are to be protected have to be respected through judicial interpretation of Métis people. With Métis claims presenting a unique set of problems for the legal system, new approaches to recognizing Aboriginal rights should be considered.

An approach that embraces the traditional laws and rights of Aboriginal peoples should be attempted. Such an approach would adequately welcome the differences in Aboriginal rights that exist with the current Canadian legal system. Only after an attempt at incorporating traditional laws and rights of Aboriginal peoples is made will the jurisprudence of Canada be truly representative of an approach to reconcile the pre-existing cultures that existed on the land that is now called Canada. The Métis are on the hunt in the Canadian legal consciousness to capture the game that they seek.

CHAPTER 5

5.0 CONCLUSION

I believe that s. 35 has the potential to work in our favour as Métis people if we can change the approach of the judiciary in Canada. This is no simple task, but as our peoples become more educated and informed by the Elders that have survived the discrimination implemented by the Canadian government to destroy our people and cultures, we have the potential to use the rules of the Canadian legal system in a way that we can finally start to realize justice. I have suggested some variances that can be considered in the approaches in the Canadian legal system and how the content of our historical rights should be recognized and protected under Canadian law.

To proceed in a way that is filled with hate and disrespect will get our people nowhere, leaves our rights in the hands of the colonial legal system in Canada and destines us to be wandering on our lands stuck with a desolate legal order of the colonizers. It is necessary that we educate the judiciary about who we are and where we came from. We need to ease the Canadian legal conscience about our rights. Aboriginal peoples are connected to the earth with distinct ways of life that are not currently understood by the Supreme Court and most of the non-Aboriginal Canadian society. The Métis are a people that underwent an ethnogenesis on this continent and have been here for their entire existence as a people. We have the responsibility to our future generations to do the best that we can to change the understanding of the judiciary and utilize constitutionalism to its fullest to make the Canadian legal system abide by its rules.

We are at a point in history where there is a renewed sense of Métis identity. Our spirits are getting stronger as we realize that we have never had to feel shame about our

Métis ancestry, jurisprudence or our culture. The Canadian Government wanted us to feel these things in order for us to forget our unique rights and who we are as a distinct people. That was a colonial tool the government utilized to sneak in and steal things that do not belong to them.

We need to be proactive in our challenges to the legal system, continue to educate ourselves and make the judiciary and parliament see that we have survived everything that they can do to us. We are now stronger for that perseverance. Section 35 of the Constitution is largely unwritten and we can stand by and let Canadian lawyers and predominantly non-Aboriginal judges define what our rights are within Canada or we can utilize the strength and education of our youth and the vision of our Elders and tell them what our rights mean.

If we choose to not participate in the legal system in Canada we will be robbed of everything we have left. We can assert whatever we want as sovereign Aboriginal peoples, but unless we challenge the current system and force it to change and understand us as historically sovereign nations with rights, laws and jurisprudence that pre-exist any European law implemented on Turtle Island, we are doomed to more destruction and desolation. We can use Canadian law as a tool to reshape the Canadian legal consciousness and bring us justice.

In a show of respect to all our relations we should not turn to anger, hate or animosity to guide us. Those are tools of destruction and are the same instruments that the Dominion Government and the Canadian state used to attempt to destroy our people. If we choose to utilize those cold emotions we will only bring more dark spirits to our hunt. We must forgive them because they do not know us. They do not know who the

Métis are or what we have faced at their hands in the Canadian legal consciousness. To achieve what we need as sovereign peoples we must use respect as our guide and not hate. We are on the hunt for the protection of the rights that we have – not seeking the eradication of respectful interactions that would shame all our relations. We can hunt together as warriors and live with a renewed prosperity or we can die alone in anger as miserable spirits without the homes and lands we have left. I choose to be a warrior and hunt with my people for our rights – Niiya aen Michif Niiya Chaas.¹⁶¹

¹⁶¹ Michif phrase for, “I am Métis I hunt.” Translation provided by Norman Fleury a Métis Elder from Brandon, Manitoba.

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